ADMISSION OF SERVICE.

Service and receipt of copies of the foregoing notice of motion, submission, verified petition, certified copy bill of exceptions, certified copy of order, and brief of argument admitted this 16th day of April, 1897.

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JAN 10 1898
JAMES H. MCKENNEY
Clerk

Brief of Knapp for E. G.

October Term, A. D. 1897. No. 98.

IN THE

SUPREME COURT

Filed Jan 10, 1898.

UNITED STATES.

THE CALIFORNIA NATIONAL BANK,
Of San Francisco,
Plaintiff in Error,

vs.

RICHARD P. THOMAS,
Defendant in Error.

Error to the Supreme Court of the State of California.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

E. G. KNAPP,
Counsel for Plaintiff in Error.

Filed this ____ day of January, 1898.

_____ *Clerk,*

By _____ *Deputy Clerk.*

United States Supreme Court.

Errors and Omissions.

California National Bank v. Thomas, No. 275. Plaintiff's briefs.

Pages 26, line 3, to page 30, are misplaced. They are part of second point, and should be read between citations and subdivision 3 at top of page 37, as part of page 37.

Page 41, second paragraph, read "procedure" for "process."

Page 41, third paragraph, read "Superior" for "Supreme Court."

Page 54, line 4, read "effected" for "affected."

Page 58, lines 1, 2, 3, should be in italics, as a subhead.

Page 61, lines 3 to 10, are FOURTH POINT, and should be so printed with the proper type and heading.

Page 68, last paragraph, citation is section 111, Pomeroy's Remedies and Remedial Rights

Page 68, last line but one, begins a new paragraph with "It was settled law."

Page 69, the first and last citations on the page are from Robinson's Civil Practice.

Page 88, the heading on this page, printed in capitals, belongs at top of page 87.

October Term, A. D. 1897. No. 275.

IN THE

SUPREME COURT

OF THE

UNITED STATES

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

THE CALIFORNIA NATIONAL BANK, of San Francisco,
Plaintiff in Error.

vs.

RICHARD P. THOMAS,
Defendant in Error.

Brief on Behalf of the Plaintiff in Error.

STATEMENT OF THE CASE.

This action was originally brought in the Superior Court of the City and County of San Francisco by John

Chetwood, Jr., as a stockholder in the California National Bank of San Francisco, on behalf of the bank and all other stockholders therein, against three of the officers of the bank, Richard P. Thomas (now the defendant in error), Robert R. Thompson, and Robert A. Wilson, as defendants.

Complaint.

The complaint is indorsed and entitled "Bill of Com-"plaint in equity for accounting and settlement of trust "by the defendants, Richard P. Thomas, Robert R. "Thompson, and Robert A. Wilson." The record shows the following facts:

The bank had failed, and the comptroller of the currency had appointed S. P. Young, receiver of its assets. Plaintiff Chetwood avers he had asked the comptroller, the receiver, and the board of directors to bring the action, but that they each and all had refused so to do, and he therefore made the receiver and the corporation parties defendant. (Marg., pp. 22, 23.)

The pleading sets forth the organization of the bank under the laws of the United States, with a capital stock of $200,000.00, divided into 2,000 shares; that plaintiff subscribed for twenty of these, and paid in the full par value $2,000.00; that he has never parted with these twenty shares, but still owns them.

The adoption of the articles of association required by the Revised Statutes is set out. These fixed the number

of directors at seven. The averment is then made (Marg., p. 4) that these articles of association provided

> "That the board of directors of said corporation should have "power, and it was made their duty, from their number to elect "a President and Vice-President, define the duties of the officers "and clerks of the corporation, and make all by-laws . . . . "for the general regulation of the business of the corporation, "and the management and administration of its affairs."

Directors were elected, and it is averred that these three defendants, Thomas, Thompson, and Wilson, were on the board from the date of the bank's organization continuously till the suit was brought. A code of by-laws, it is alleged, was regularly adopted, and remained in force all this time.

Then follow (pp. 5 to 8) sections 7-17 and 18 of these by-laws, pleaded at length. They define the duties of the president and vice-president, and provide for the appointment of an executive committee of the directors, of which committee these two officers are ex-officio members.

Section 7 deals with the duties of this committee, requiring it to "have and exercise immediate supervision of all the officers of the bank."

Section 17 gives the President "general control and supervision of the affairs of the bank," makes him "responsible for all sums of money and personal property of every kind, which may be intrusted to his care or come under his control as President"; directs him to "perform

all duties required of him by the bank laws of the United States," and gives him also "supervision of all employees of the bank," with power to "suspend them when necessary, reporting his action and occasion therefor to the board of directors at its next meeting."

Section 18 requires the vice-president to assist the president.

After the adoption of these by-laws, Thomas, it is alleged, was elected president, Wilson, vice-president, and Thompson was appointed the third member of the executive committee, with the two former as ex-officio members.

The bill of complaint continues (marg., p. 9): "That thereupon each of said defendants, Thomas, Thompson, and Wilson, duly accepted said offices," and (p. 10.) "That upon their said election and appointment as such officers, the said three defendants severally, and as such president, vice-president, and executive committee, duly accepted the position of the respective officers, and as provided in the above-mentioned code of by-laws and the above-quoted sections thereof, and duly accepted the trusts and obligations to perform each and all of the duties therein prescribed, with due skill, care, attention, prudence, diligence, fidelity."

The duties of these officers and of the committee are enlarged upon further, and at page 12 m., is the averment:

"That well knowing each and all of said facts above recited, said three named persons defendants, Thomas, Thompson, and Wilson, severally, being fully aware of the nature and extent of said trust, and the duties thereof, accepted and retained the said trust, and unto the said corporation promised faithfully to dis-

"charge the same, and each and all of the said duties thereof in a "proper, careful, and judicious manner, ... and the said cor- "poration fully confided in their fidelity and diligence, and so "confiding, intrusted to said three persons the discharge of the "said duties, and duly appointed and retained them in their re- "spective offices."

They held these offices, it appears, from the date of their appointment immediately after organization of the bank till its failure, Thomas being president and member of the executive committee, all this time, as well as director: Wilson, vice-president, director, and committeeman. Thompson held no position, but that of director and member of the Committee.

Then follow averments showing that the bank began to do business, but that these defendants failed to attend to their duties. The language of the bill here (p. 13, m.) is

"Not regarding their aforesaid duties, nor their respective and "concurrent promises in that behalf, but wholly disregarding the "same, and contriving together to injure and deceive the said cor- "poration, (they) neglected and omitted, without any reasonable "excuse to exercise their own skill, care, judgment, and discretion "in the making of loans and discounts out of moneys in the pos- "session of said bank, and otherwise directing the business of "said bank, but they negligently permitted the cashier of said "bank to control and manage the whole business of said bank as "he saw fit, and without consulting or in anywise informing said "defendants, or any or either of them, to lend the moneys of said "bank at his own pleasure, etc."

This course of dealing wrecked the bank. The cashier, to whom everything was left, proved incompetent and

dishonest. The entire details of the misuse of the funds of the bank, the plaintiff avers, he does not know (marg., p. 14). He, however, alleged quite a large number of transactions, amounting to a course of dealing with certain favored persons, which he averred caused losses to the bank in amounts aggregating something over $200,000. And these losses, it is charged, necessitating suspension and liquidation, caused the destruction of the capital of $200,000.00—the loss, further, of a surplus of $30,000.00—and resulted in the levying by the comptroller of an assessment aggregating $75,000.00.

It appears (mar., p. 21) that some $20,000.00 of the portion of this assessment levied on the stock of Mr. Thomas is still unpaid; though all the other stockholders, plaintiff included, paid their proportion of the assessment in full.

These burdens and losses including the amounts paid on the assessment are all pleaded as "the direct and inevitable result of the losses aforesaid," all of which resulted "from the negligence of said executive committee." (Mar. p. 18.) At p. 19 marg. is the following allegation:

> "That said President, Vice-president, and Executive Com-
> "mittee could and should have prevented the occurrence of each
> "and all of the said improvident uses of the money of said Bank,
> "by giving attention to and discharging the duties of their said
> "trust; and, had they done so, none of said losses and improvi-
> "dent uses of money would have occurred. But defendants
> "Thomas, Thompson, and Wilson, utterly neglected their duty
> "in the premises and willfully neglected to take any care or exer-

"cise any supervision of the officials and business of said Bank, "but negligently permitted the said cashier to do as he pleased "with, and misuse, waste, and lose the moneys of the bank, and "by reason of their negligence and omissions of defendants "Thomas, Thompson, and Wilson, and not otherwise, each and "all of the said losses of the corporation occurred."

The defendants are alleged to be able to make good these losses, and the prayer (p. 24) is that they "be held to an accounting of their said trust, that they restore unto said corporation the sum (with legal interest from said loss) so as aforesaid lost by their negligence," for judgment in favor of the corporation, and that "plaintiff do have such further order, decree, judgment and relief as may be meet and agreeable to equity."

Answer.

To this complaint an answer was filed by defendants—Thompson and Wilson, which contains a further provision of the by-laws of the Bank, relative to the duties of the President to wit, section 19. (Ans. of Thompson & Wil-n p. 48, of Record.)

This section still further distinguishes the duties and liabilities of the president from those of the other officers.

By it the cashier is made everywhere subject to the order of the president; he can do nothing without the concurrence of the president. The language is as follows:

"He (the cashier) may, under the direction and with the "concurrence of the President, discount bills, notes, or other evi- "dence of debt and make loans under the same restrictions as the "President (i. e. not over $10,000 to any one person); issue and "sign certificates of deposit, draw checks and warrants upon the "bank, in the ordinary and usual course of its business, and pay "the current expenses of the bank when approved by the execu- "tive committee."

The section of the by-laws providing for an auditing committee to examine into the bank's affairs and make quarterly reports is also (p. 50 marg.) pleaded in this answer.

This pleading of the defendants Thompson and Wilson was expressly adopted by defendant Thomas as his answer (see stip. p. 58, marg.), and under well-known rules its allegations and admissions bind him and supplement the averments of the complaint. Defendant Thomas filed no answer for himself; made no denial of the facts showing him peculiarly and chiefly culpable.

Trial.

On these pleadings the case went to trial, and on April 27th, 1894, the trial Court made the order appearing at p. 59 (marg.) of the record, wherein the court orders that the plaintiff is entitled to have judgment against defendants Thomas, Thompson and Wilson, but for what amount the Court is unable to say without further testimony, for the taking of which a reference is ordered.

The next order recites (marg., p. 60), that "whereas the

"TAKING OF AN ACCOUNT IS NECESSARY FOR "THE GUIDANCE AND INFORMATION OF THE "COURT, the Court appoints T. C. Kierulff, Esq., to exam- "ine the books, papers, drafts, and documents of the "Bank," and report the amount owing the bank on three certain dates from three of its customers named in the order.

The trial proceeded before the referee, and his report filed Aug. 17th, 1894, (rec. p. 63, mar.) It gives the indebtedness of the three favored customers mentioned in the complaint and in the order of reference as these appeared from the books of the bank on July 8th, Aug. 6th, and Dec. 15th, 1888—this last being the date of the failure of the bank. (See Marg. p. 19, 20).

Still there is no decision of the court as to the amount that the defendants are liable for, and no express decision that all are liable in the same amounts; the order of April 27th, awarding judgment, not being the final decision in writing required by the statutes of California in all cases tried without a jury (C. C. P., sec. 632), judgment entered on such an order, even if it had stated an amount or amounts, would be set aside as void. (Van Court vs. Winterson, 61 Cal. 615.)

The Court in its final decision might still render judgment in their favor or against them, and in the same amount or in unequal amounts. The trial of the case is not yet at an end.

Dismissals.

This is the condition of the case Sept. 24th, 1894. On that day (see record pp. 64 to 69 marg.), two stipulations were filed and two orders entered by which the defendants Thompson and Wilson are dismissed from the case. To these proceedings the corporation and defendant Thomas are not parties. As to them the judgments of dismissal are ex parte.

It was, however, only after a full disclosure to the Court of all the facts (as the findings show,) that the dismissals were sanctioned and entered of record.

These dismissals left the suit one to recover against R. P. Thomas alone, sued and described in the pleadings as president, director and member of the executive committee.

As such the action proceeded, the cause having been submitted, written decision ("findings") were filed Nov. 20th, 1894. (Marg. p. 70 to 90.)

Decision of the Trial Court.

As Thomas, the president, is now the sole defendant from whom a recovery is sought, the findings are silent on many points bearing upon the case of defendants Thompson and Wilson, which by reason of the dismissals are no longer issues in the case, and the decision deals principally with the duties and liabilities resting upon Mr. Thomas, the president.

It is found (pp. 77-78 mar.), that he took control and entered upon the discharge of his duties under the by-laws; that the bank paid him a salary regularly (p. 78 mar.) for his services; that it relied upon him and entrusted him with the management of the bank and imposed on him the duties as president under said by-laws, particularly the provisions above recited.

Many specific facts are set out distinguishing his case from that of the other defendants, making his neglect and breaches of his duties and promises more glaring than those of his co-defendants, more culpable in him, and more hurtful to the bank (pp. 80, 81, 85-86, marg.)

Finding 5, for example (marg. p. 81), refers to a report of the auditing committee, containing warnings of the bank's condition (p. 80), and shows that Thomas, the president, had been notified, and his attention specially drawn to this report in July and August, 1888. Again, finding twelve (12) shows (mar. p. 85), that he had "full and constant access" to papers showing improper loans to the three parties named in that and in findings 15 and 16, far above the limit allowed by law. Finding 13 (mar. p. 85) is to the effect that he could easily have prevented all of the said improper uses of money, loans and alleged losses by merely doing his duty under the by-laws, and that had he done so, none of these losses would have occurred; that his failure to do so caused the failure of the bank.

Then follow (mar. p. 87), findings 15 and 16 in these words:

15.

"The amount of the actual loss to the corporation on the three "items, in finding No. twelve hereof mentioned, between the date for "auditing committee's report, and that of the failure of the bank "(July 8th or Aug. 6th to Dec. 15th, 1888.), was the sum of one "hundred and sixty-six thousand nine hundred and nineteen ($166 "919.00) dollars.

16

"From the defendants Robert R. Thompson and Robert A. Wilson, "of, for and on account of said loss, there has in this action been col- "lected the sum of twenty-seven thousand five hundred, ($27,500.00) "dollars; leaving a net loss to the bank, of the sum of one hundred "and thirty-nine thousand four hundred and nineteen, ($139,419.00) "dollars.

Judgment was entered in favor of the bank (plaintiff in error), and against defendant Thomas, for this amount, $139,419.00, the unpaid balance of losses resulting from the loans made to the three favored customers mentioned in the complaint and referred to in findings 12, 15, and 16, with interest thereon from Dec. 15th, 1888, the date of the bank's failure, and $319.70 costs.

From this judgment defendant Thomas took an appeal to the Supreme Court of the State. There was no motion for a new trial, and the evidence is not preserved in any bill of exceptions.

Decision of the Appellate Court.

The Supreme Court reversed this judgment, and directed that judgment be entered against plaintiff, releasing

defendant Thomas from all liability. The conclusion and judgment of the appellate court are as follows:

"The plaintiff in this case, by accepting $27,500 from "the two defendants for and on account of the joint tres- "pass of the three, and by releasing them, has released "his claim against the third."

"Intolerable fraud and oppression could be worked if "a judgment such as this, and so obtained, could stand."

"This judgment is reversed and the cause remanded, "with directions to the trial Court to enter a judgment "in favor of the defendant Thomas."

To review this judgment of the Supreme Court of the State, the bank as plaintiff in error sued out the writ under which the record has been transmitted to this Court.

Specifications of Error.

The Supreme Court of the State erred, in the following particulars:

1st. In denying the claim of the bank that its president was liable to it under the by-laws of the bank and the laws of the United States.

2nd. In denying the claim that the laws of the United States and the bank's by-laws adopted by authority of the laws of the United States fix the measure of the duties and liabilities of the president of a National Bank.

3rd. In denying the claim made under those by-laws, and the laws of the United States that the defendant in error is liable to it severally, for the whole amount of its loss.

4th. In holding that there is no element of contract or trust in the case at bar; but that it is a suit "in tort" and against joint tort feasors; and that the agreements and promises of defendants do not affect the cause of action.

5th. In holding that the trial court had adjudged defendants liable jointly in a single amount.

6th. In holding that the action is legal, not equitable.

7th. In holding that the judgments of dismissal in this case amounted to a retraxit, or operated to release or in any way affected the liability of defendant Thomas.

8th. In holding that plaintiff by allowing $27,500.00 to be paid into court on account of the losses of the bank, and dismissing as against two defendants, released the claim of the bank as against the third.

9th. In holding that the judgment as entered on the record, worked an injury to defendant Thomas.

10th. In denying the right of the bank to recover a several judgment for its losses against its president,—the defendant in error; and in reversing the judgment entered by the trial court.

Argument and Authorities.

A motion to dismiss has been submitted, but not ruled upon, and we refer in the course of the argument to the jurisdictional questions, though briefs were filed on the motion.

The case when it came before the Supreme Court of the State was a suit to recover against defendant in error alone.

It became so before findings were filed or the trial ended, by the dismissals in the lower court.

It is this several liability, resting on defendant in error clamed under the by-laws pleaded, and the statutes of the United States, and the right to recover thereon a several judgment against him in this action, which were denied to the corporation by the decision and judgment of the Supreme Court of California.

The point that the liability existing and declared upon is something ultra the Statutes of the United States, the by-laws and articles of the bank, and its agreements with its officers, is the basis on which the state Supreme Court rests its final judgment that all liability ceased when two defendants paid a portion of the bank's claim and obtained judgments of dismissal.

We refer in this connection to the briefs filed in opposition to the motions to dismiss for want of jurisdiction.

FIRST POINT.

The suit is not in tort; the defendant in error is not a mere tort feasor, the defendants are not sued as joint tort feasors. The action is one brought to enforce contracts of the officers to give their services to the bank, and abide by and perform the duties prescribed in the by-laws, articles, etc., adopted and validated by the laws of the United States. Herein of the jurisdiction.

The Supreme Court of the state in their decision admit the existence of an agreement on the part of defendant in

error to discharge with due care the duties prescribed in the bank's by-laws; but insist that there is another and more general duty than any flowing from this contract—one independent of the contract, and that the action is to enforce the latter alone.

"With or without contract," it is said in the opinion, "the duty is imposed upon all not to injure the property "of another. And for a failure to observe that duty the "right of action in trespass for the tort exists. Such is "the cause of action here set up."

Admitting the existence of such a contract as pleaded however, it is clear that this suit is one to enforce the obligation of that contract, and to recover for a breach thereof. It is said by a learned English writer (Pollock) on Torts, that the "overlapping of contract and tort gives "rise to troublesome questions.

"For the obligation of many contracts is, by usage and "the nature of the case, not to perform absolutely, but "to use all reasonable skill and care to perform it. "In "such case a total refusal or failure to perform the con-"tract is rare. The kind of breach commonly complain-"ed of is want of due care in the course of performance." (Pollock on Torts, p. 354.)

The question as to the nature of the duty and of the proper action, is now, however, as it was when the action of trespass on the case first came into use, largely a matter of practice.

When actions were distinguished as at later common law by the form of the declaration, the question as to

whether a suit be in tort or contract could of course not arise.

But in California, all forms of action are abolished. There is now but one form wherein the facts must be set out. Plaintiff has herein set them forth, and could have no second action. The action brought is at the least as much one for breach of contractual rights as to recover for a tort.

The joint and several contracts of agency are pleaded; and any facts added thereto showing negligence or even fraud or oppression in such case, would not make the action one in tort.

"The rules founded upon the distinction at common "law between actions of contract and of tort are alike "inapplicable to California practice. Every action under our system may be termed an action on the case."

Jones v. Str. Cortez, 17 Cal. 487, 489, per Cope, J.
Pomeroy's Rem., sec. 573.

Mere forms of action in this State have been cast aside. Rogers v. Duhart, 97 Cal. 504 (citing Jones v. Cortez), where the following language is used by Paterson, J.:

"Does the complaint state in ordinary and concise lan-"guage facts sufficient to constitute a cause of action? "This is the question, not whether it is sufficient to show "trespass quare clausum fregit, trespass vi et armis, or "any other technical form of action ex delictu or ex contractu."

To cases such as that at bar, brought under the Code system, the language of the learned writer quoted above

is specially apt in this connection. He says (Pollock on Torts, p. 437):

"Now, that the forms of action are generally abolished "or greatly simplified; it seems better to say that where- "ever there is a contract to do something, the obligation "of the contract is the only obligation between the parties "with regard to the performance. And any action for "failure OR NEGLIGENCE therein is an action on the "contract; and this whether there was a duty antecedent the contract or not."

Where the duty flows or is derived from the contract, the action is on the contract, though negligence is charged.

Stark v. Wellman, 96 Cal. 400.

The breach of a contract is often negligence.

The decision in Burrows v. Marsh Gas Co., is rested on the ground that negligence of defendant was the proximate cause of the damage.

"But, as is pointed out in a treatise of authority (Bige- "low on Torts, p. 611), the true ground for the decision is "that taken by Cockburn, C. J.

" 'The action is not for negligence in its ordinary sense, " 'but for the breach of a contract whereby defendants " 'promised to supply the plaintiff with a proper and suf- " 'ficient service pipe from their mains to a gas metre " 'within his premises, and the question is whether there " 'has been a breach of this contract.' "

Beven on Negligence, p. 72.
Burrows v. Marsh Gas Co., L. R. 5 Ex. 67 (7 Ex. 96.)
Lamer v. Alb. Gas Co., 44 N. Y. 159.
Armstrong v. Luco, 102 Cal. 272.
Burns v. C. & B. R., 13 Ir. C., L. R. 542-546.
Austin v. G. W. R. Co., L. R. 2 Q. B. 442.

So in the case at bar there is a contract of agency—the mandatum of the Roman law. And the by-laws themselves, as between the corporators are in the nature of a compact.

Kent v. Quicksilver M. Co., 78 N. Y. 159, 179.
Poultney v. Bachman, 31 Hun, 49.
The Bank v. Guice, 2 La Ann. 249.
Thompson on Corporations, sec. 940.

The obligation of each of these contractual relations has been violated under the facts of this case.

But the Court, in deciding the case, say that the promise or the averments of the promises and agreements made to discharge the duties of the trust were unnecessary; that "the law imposed upon them the duty of using "due care when they agreed to discharge their duties as "members of the committee."

So it might be said of every duty, however, created or arising, it is the law which imposes the duty and gives the remedy. The law is the cause, the contract or other relation but the occasion of the obligation. (Pomeroy Con. Law, secs. 590-91). And if there be in the case of defendants a double duty—one ultra the contract and by-

laws, as well as one by virtue of the contract and the by-laws, we have declared upon the latter, and it is for us, not for the Court, to make the election, which right we will seek to enforce, which remedy we will ask. (Rich v. N. Y. C. R. R., 87 N. Y. 382.)

If the Court's language here imports that there is no duty that it is bound to enforce save that existing before and without or independent of this contract, then the right to make a binding contract fixing and defining the duties and liabilities of the bank's officers, and the right to enforce and recover on that contract is denied to the bank in this action. The right to bind the directors and president by their agreement to observe the by-laws is denied.

Even if all the by-laws be taken into consideration in determining the character of the so-called tort, there is a wide difference between the liability of defendants, if they are held under their contracts, and that attaching under the general law of torts to the positions held by them.

The very point upon which the State court confidently rests its final decision releasing the president from all liability is that he is, as the Court argues, sued for a pure tort, and not for a breach of contract or of trust.

If the liability of defendants (or defendant in error) is for breach of contract or for a breach of trust, even if they be all equally liable as joint debtors and not severally, then would the general rule (now statutory in Cal.) apply that a release of one would not release the others.

This rule is enacted in Cal. Civ.Code, sec. 1543.

"1543. A release of one of two joint debtors does not "extinguish the obligations of any of the others, unless "they are mere guarantors, nor does it affect their right "to contribution from him."

This would prevent the operation of the rule applied to exonerate Thomas if the suit is on a joint contract.

If the contracts are several, as we plead them, then, certainly, Thomas is not released. In either case, the rule deduced in the opinion under discussion from the assumed tortious character of the breaches of duty would not suffice to release defendant in error, and the dismissal entered as to the others would affect his liability in no respect whatever.

A.—The right to hold defendant in error severally liable under the by-laws is a right claimed under laws of the United States. The decision that the action is "in tort" for breach of a general common-law duty denies this right by denying any binding force in the by-laws. The decision that no claim is made in the complaint that any several liability rested on any defendant denies the same right, the sufficiency of the facts pleaded being a question for this Court.

The by-laws must be considered as a fact, even if the liability should be conceded to be purely tortious, as for negligence. The question of negligence of directors particularly is ultimately and in all cases a question of fact to be determined under all the circumstances.

Empire St. Bnk. v. Beard, 88 N. Y. 189-192.

Sayles v. Cent. Bnk. of Rome, 41 N. Y. Sup. 1063, (citing) Briggs v. Spaulding, 141 U. S. 132.

These by-laws fix the duty, and that is the measure of the required care (Cooley on Torts, p. 526). They are therefore the controlling factor.

If a State court can disregard the obligations imposed by them, and hold that they may be disregarded in a case where they are distinctly pleaded it can set up a standard of its own whereby the duties of the officers are defined. Such ruling deprives the bank of an important right claimed under federal law to hold each officer accountable strictly as provided in the bank's by-laws and laws of the United States, and require performance of all, not part of, the obligations there imposed.

The decision allows the duty of the officer in one capacity (as member of the executive committee) to nullify the duty resting on the President, though that duty is pleaded, and the facts showing breaches of the President's duty practically admitted in the pleadings.

It is said no negligence of the President as President, is pleaded. That is to disregard the facts set up in the complaint and to deny plaintiff the right to enforce the obligations imposed by the by-laws pleaded relating to the duties of the President.

What the defendants do or omit to do in one capacity they do in all. They are sued as individuals, not in a representative capacity.

The obligations rest on defendants by virtue of the by-laws and the statutes of the United States, wholly independent of the common law or law of torts.

The by-laws are as binding on the members of a corpo-

ration as a public law of the land, though the sanctions may be different.

Cummings v. Webster, 43 Me. 192.
Weatherby v. Med. Soc., 76 Ala. 567.
Thompson on Corpns., sec. 939.
Kent v. Quicksilver M. Co., 78 N. Y. 179.
G. G. Cong. v. Pressler, 17 La. Ann. 127.
Un. Bnk. v. Guice, 2 La. Ann. 249.
Brick P. Ch. v. Mayor, 5 Cow. (N. Y.) 538.
Samuel v. Holladay, Woolw. (U. S.) 400, pr. Miller, J.
McDermott v. Board of Police, 5 Abb. Pr. 422.

We quote from the last citation the following:

"By-laws, rules , and regulations of the Board of Po-"lice, for trial and removal from office, being expressly "authorized by the legislature, and being in conformity "with the power there conferred, have the same force and "significance as though they were enacted by the legisla-"lature."

It is proper and necessary to plead the by-laws (as plaintiff did) when a breach of a duty they impose is counted upon.

Union Bank v. Ridgely, 1 Han. & G. (Md.) 324.
Olds v. Chicago B. T., 18 Ill. App. 465.
Middletown B. v. Russ, 3 Conn. 135.
Gray v. Nat. B. A., 111 Ind. 531.

If this obligation of the by-laws is not contractual as plaintiff pleads it, it is still one flowing from the laws of

the United States, which authorize the enactment of by-laws to define the duties of the bank's officers; and the right denied in this case, the right to recover against defendant in error, is one claimed under the statute of these United States.

"The cause of action rests upon the requirements of the "laws of the United States and by-laws made pursuant to "such laws, and therefore is one arising under those laws, "jurisdiction over which is not taken away by the Act," per Wheeler, J., in

Witters v. Foster, 26 F. R. 737 (23 Blatch. 457).

referring to the Act of June 3d, 1882, defining the jurisdiction of United States courts in cases affecting national banks.

B.—The enactment of these by-laws by the corporation is an exercise of an authority under the laws of the United States, and the State Supreme Court called this in question and decided against the validity of this authority, by its ruling that the common law, not the Statute of the United States, and the by-laws created the duty declared upon here.

The common law cannot be said to do more than give a remedy, but the remedy or right to sue as for a common-law tort is not the right claimed. On the contrary, the plaintiff claimed the right under the United States statute to recover, by force of the duties there and in the by-laws imposed, the whole sum lost, and an immunity from the rule that torts applied to release defendant in error.

In McNulta v. Lochridge, 141 U. S. 331, a claim by a receiver of a railroad, under United States laws, to immun-

ity from suit without previous leave of court the decision being adverse to his claim, was held to give this Court jurisdiction. It is said in the opinion: "He was, as receiver, exercising an authority under United States laws."

Citing Buck v. Colbath, 3 Wall. 334;
Feibelman v. Packard, 109 U. S. 421;
Railroad case, 115 U. S. 1.
Etheridge v. Sperry, 139 U. S. 266;
Bock v. Perkins, 139 U. S. 628.

The motion to dismiss was denied, though the defense was held invalid, and the motion to affirm granted.

The case is affirmed in Metropolitan Bank v. Claggett, 141 U. S. 520, and cited on this point.

It is not necessary that the construction of the laws of the United States be involved under section 709, Rev. Stats. It is enough if the right in question come from an authority exercised under the United States.

Carson v. Dunham, 121 U S. 421.

Stanley v. Schwalby, 147 U. S. 512, was a suit in trespass to try title to land against agents of the United States. The United States appeared and pleaded the statute of limitations; the pleas were stricken out, and the case dismissed as to it. The case in this Court was reversed for refusal to allow the United States agents the right to plead the statute of limitations.

The decision against defendants (United States agents) involves the validity of an authority exercised under the United States, and the final judgment of the State Court

being against its validity, jurisdiction exists in the Supreme Court to review that decision on writ of error—per Fuller, C. J.

1.

By section 17 of the by-laws (marg., p. 6), the president is authorized to make loans "not exceeding $10,000 to any single individual, firm, or corporation."

By section 18 (marg., p. 48), the cashier is under the same restrictions in this particular, besides having no power to make loans without consent of the president.

From the referee's report (marg., p. 63) and the decision of the Court (marg., pp. 85, 86, and 87), it appears that loans were made by the cashier to three different persons, exceeding in each case the above limit. On December 15th, when the bank failed, these three persons owed the bank, on unsecured loans made by the casheir to them, the following sums respectively:

David Guttman, indebtedness, Dec. 15, 1888, $70,622.49.
J. H Woodward, indebtedness, Dec. 15, 1888, $75.385.00.
D. C. Wickham, indebtedness, Dec. 15, 1888, $51,085.42.

These are the loans, and these the items on and by reason of which the loss of $166,919.00, is charged against defendant and for which judgment was rendered (marg., 87), occurred

The total debts of these three borrowers at the date of the failure aggregating $192,092.91, which was $167,092.91 in excess of the amount the president and cashier were given power under the by-laws to loan to any three persons.

This excess is practically the loss (within less than $200.00 of the actual amount) occurring by reason of these loans, and the amount for which judgment was ordered entered; or for which defendant Thomas was held liable.

2.

The trustees or directors, and the executive committee, were not limited to $10,000.00 in making loans. Their power would be limited by the Revised Statutes, section 5200, in making loans to $20,000.00, being one-tenth of the bank's capital.

These three items were each in excess of this amount, as well as in excess of the amount fixed by section 17 of the by-laws.

Under section 5239, Revised Statutes, therefore, (if they assented to the same), each of the defendants would be "individually and personally" liable for all damages sustained in consequence.

But Thompson and Wilson might plead ignorance, and so escape liability under this statute. The case of Thomas is different. He, as president, is charged with notice of all acts of the cashier, who can act in such matters only under his direction and with his concurrence. He, the president, is liable for this whole loss under the provision of the by-laws last quoted, and under this section of the Revised Statutes as well. He is clearly guilty of infractions of the provisions of both.

Clews v. Bardon, 36 Fed. Rep. 617.

Stephens v. Overholtz, 43 Fed. Rep. 465.

Bailey v. Mosher, 63 Fed. Rep. 488.

Joint Stock Co. v. Brown ,(1869), 8 L R. Eq. Cas. 380-404.

Second Nat. Bk. v. Burt, 93 N. Y. 233.

He must be held to have assented to every act of the cashier, for without such assent and concurrence the cashier had no power to act at all. The other directors under the pleadings are not charged with assenting, and are not liable under this section of the statutes.

The nature of the liability, as something besides a mere tort, appears from this consideration.

The president exceeded his powers under the by-laws in making these loans. Whether done designedly and willfully, or inadvertently and negligently, does not alter the fact that there has been a plain breach and infraction of the duty or obligation imposed by and under the by-laws.

For this act, the law, if damage results, will give a remedy. But that remedy is not a right to recover damages against the president for negligence. Independent of negligence, he has broken a positive term of the by-laws, exceeded his powers The liability is either contractual, or, as we think, statutory, depending, as it does, on the right given by the statute to enact by-laws defining and limiting powers of the bank's officers. The statute (5239) is held to be remedial, not penal, and the liability one that does not abate by death, as in case of a tort.

United States v. Dewey, 39 Fed. Rep. 251.

Stephens v. Overholtz (supra).

Further, the liability is not joint. The president has been guilty of an act ultra vires under the by-laws; the other defendants have not exceeded their powers, not being privy to those loans, not having assented to them, and are not liable unless they have been guilty of a breach of their contracts or their duties, under the by-laws, the laws of the United States, or the common law.

The president, if liable under section 5239, is liable, because of the statute, in his personal and individual capacity, for the whole damage, not as for a tort by reason of negligence. (See cases last cited.)

Whether it be this statute or the by-laws and the statutes giving them force and sanction under which the president is liable, the claim is made under both, and a denial to that claim by the judgment of the Supreme Court of the State raised a federal question.

Even at common law the duties of a president are more onerous, his responsibilities greater than those of the other officers.

Thompson on Corpns., 4683 (vol. 4), cases cited.
Morawetz, 537-8.

Under the United States laws and these by-laws the duties of the chief executive officer are still further increased and distinguished from those of the other officers.

If the cause of action were a pure tort, the action would die with the death of defendants. It is held otherwise in actions of this character.

Witters v. Sowles, 31 Fed. Rep. 4.
Stephens v. Overholtz, 43 Fed. Rep. 465.

Lee's Admr. v. Hill, 12 S. E. 1052.
United States v Dewey, 39 Fed. Rep. 251.

Moreover, there is good authority that in cases such as that at bar, where the injury is not the direct result of the acts of defendants themselves, but their failure to direct and oversee the acts of others, no action at law in tort or at all lies. The plaintiff must find his remedy in equity, which will permit no wrong to go unredressed.

Trustees v. Bossieux, 3 Fed. Rep. 830-831.

We respectfully submit that the plaintiff in error claimed in the case at bar the right under the laws of the United States to disregard the common-law duties attaching ordinarily to the position of president of a bank, and asserted the right to define the duties of its president for itself in its own organization and laws, to make those the basis of its contract with them, and for a breach of them brought suit, seeking to recover for that breach of duty, in contract, declaring upon the contract of agency and the duties in the by-laws.

That this right claimed included and includes the right to hold each severally, or all, strictly to account, and to recover damages that should be a debt, and not a mere claim for tort to be satisfied or released by release of one or by the death of those sued.

That the by-laws and contract of agency are sued upon in this action, and these are made under express authority of federal statute. That the right to proceed against

all of the three, to dismiss against two, on part satisfaction, and to have and recover thereafter a several judgment for the whole unpaid balance of the loss, was asserted and claimed under and claimed by virtue of the provisions of the United States laws, to which we have referred.

These rights so claimed the State Supreme Court denied, and in so doing erred.

This Court has jurisdiction to review the decree of the State court in such case:

Osborn v. Bank, 9 Wheat. 823-4.

Pac. R. R. cases, 115 U. S. 1-13.

Walker v. Windsor Bank, 56 Fed. Rep. 76-80.

Gulf v. Hefley, 158 U. S. 98-100.

Davis v. Elmira S. B., 161, U. S. 275.

McClellan v. Chipman, 164 U. S. 347.

Witters v. Foster, 26 Fed. Rep. 737.

And cases cited supra and in former brief on motion.

The sufficiency of the facts pleaded and relied upon to make out a case under the United States laws is a question for this Court to decide.

Mitchell v Clark, 110 U. S. 633.

Covington etc. Co. v. Sandford, 164 U. S. 579.

SECOND POINT.

THE PLAINTIFF claimed the right in the trial court and in the State Supreme Court to TAKE JUDGMENT

AND SUSTAIN THE SAME AS AGAINST THE DEFENDANT IN ERROR, THE PRESIDENT, UNDER SECTIONS 5200 and 5239 of the Revised Statutes of the United States. That right was denied by the judgment of the Supreme Court of the State. In this the State Supreme Court erred, and their judgment should be reversed. The judgment given in the trial court was fully sustained by pleadings and proofs and should stand.

This point was made in the brief filed in opposition to the motion made to dismiss, but by some error there the Court is referred to section 5204, Revised Statutes, instead of 5200 as the basis of plaintiff's claim.

By that section (5200) the bank (plaintiff in error) and its officers were forbidden to allow the total liabilities of any one person, company, firm, or corporation (including in the liabilities of a company those of the several members thereof), to exceed at any one time one-tenth part of the capital of the bank. "But," the section continues, "the discount of bills of exchange, drawn in good faith "against actually existing values, and the discount of "commercial or business paper actually owned by the per-"son negotiating the same shall not be considered as "money borrowed."

The language of the statute is guarded. A discount of bona fide secured bills, or a purchase of commercial or business paper actually owned by the negotiator, is not a loan.

The plain inference from this is that a purchase or discount of bills or notes totally unsecured save by the per-

sonal liability of party selling or negotiating them, to-wit, drafts and notes made by the party himself, or discounts made in bad faith as in the case of loans made on the faith of indorsements by parties known to be at the time without means or credit, are to be regarded as they of right should be, and in fact are—merely as loans to the party making the paper or receiving the money.

The bank is not forbidden to buy drafts drawn by the negotiator, and unsecured or unindorsed. But such transaction (unless the drafts be in some way secured) is by the statute rightly made a mere loan; and loans to any one person or firm, however responsible, must not under the statute exceed (in case of this bank) the sum of $20,000.00.

Such were the transactions of this bank, had through its cashier, with the favored customers, Woodward, Guttmann, and Wickham—the three borrowers on whose accounts the loss of $166,919.00, for which judgment was given, occurred.

The transactions are set out in detail in the bill (marg. pp. 15, 16, 17). The dealings with Wickham are stated to have been a borrowing merely, a loan creating a simple indebtedness, unsecured to the extent of $35,000.00.

Those of Guttmann and Woodward are charged as the purchase (not the discount) of bills of exchange, drawn by the men themselves, unsecured, in any way, unindorsed, unaccepted certainly by any responsible person.

Those of Woodward are charged to have been of such a character that it was injudicious, even reckless, to buy

them at any price, and plaintiff avers that the cashier knew this.

Taken in connection with all the allegations at p. 14 (marg.), wherein these acts are characterized as a purchase of pretended , rather than real securities, they may easily be said to have been made in bad, rather than good, faith, and thus without the exception of the statute.

There is practically no difference between the purchase and the discount of commercial paper by a bank. Both are but "modes of loaning money."

Pape v. Capital Bk., 20 Kan. 440.

Atlas N. B. v. Savery, 127 Mass. 75. (Morse on Banking).

Brown's Ex. v. N. S. B . of Eliz.,73 U. S. App.

Simmons v. Fisher, 55 Fed. Rep. 914.

The statute speaks solely of discounts; the transactions are styled loans, both before and after their recital (record, marg. pp. 14, 16, 17). A deposit in bank is a loan under this provision.

Bank v. Lanier, 11 Wall. 369.

The Court found that these were loans. The order appointing referee (p. 60) directs an account to be taken to determine the amount "due and owing" from these three persons—Woodward, president of the Alameda Co. R.R., Guttmann, and Wickham—on three different dates.

These dates, July 8th, 1888, Aug. 6th, 1888, and Dec. 15th, 1888, were respectively the dates of the following

important transactions in the history of the bank. On July 8th 1888, the auditing committee of the directors made a written report of the affairs of the bank, showing it to be doing an unsafe business.

On Aug. 6th, 1888, this report was filed with the papers in the president's charge. On Dec. 15th, 1888, the failure occurred. (See Findings, marg. pp. 79, 80.)

The referee reports that these three persons were "indebted" to the bank in large sums at each of these dates, and the amount of "indebtedness" of each on each of these days is given. (Marg., pp. 69, 63.)

The Court found these men to have beeen mere borrowers (marg., pp. 85, 86, 87, Findings), besides finding the transactions in detail substantially as in the complaint (Findings 8-10), and throuhout the decision (as in the pleading), they are styled and characterized as "loans."

On Dec. 15th, 1888, when the bank closed its doors, each of these three men owed the bank sums far in excess of the limit fixed by section 5,200, Revised Statutes. Guttmann owed $70,622, Woodward $75,385, Wickham $51,085, aggregating over $197,000.

This was $167,000.00 in excess of the amount which the president and cashier had power to loan them; even if the borrowers had been men of ample resources and was $137,000.00 more than the bank had power to loan to any three men by a vote of the full board.

The whole loss for which judgment was given in this action was on these three items and amounted to $166,919.

If the president assented to these loans, then under section 5239, he is liable for this loss in his individual and personal capacity.

Thompson and Wilson are not charged as having assented to this violation of the statute.

Defendant Thomas, however, received warnings, and had personal knowledge of what was going on months before the crash. (See Findings, marg. pp. 80 to 85.)

As the cashier was, under the by-laws, in all things subject to the president, without power to make loans or discounts save with his concurrence, the president must be held to have participated in and assented to each and every one of these excessive loans, and violations of the statute by permitting the cashier to make them.

His attention was especially called to the report of the auditing committee in July and Aug., '88 (p. 80).

The papers in his hands showed all this time and on till the failure, the growing indebtedness of these three men. (p. 85).

No man can shut his eyes to the acts of a person who is acting and empowered to act solely with his concurrence, and thereafter say I did not concur. In such case silence shows assent, if it does not give consent.

Brown's Case, 8 L. R. Eq. P. 404.

If the president knew (as he must have known) of these loans, he consented to them. The findings are that he had the means of knowledge before his eyes. He should

have brought suit, if necessary, to prevent them. Not doing so he is liable for the loss.

Thompson's Liability of Officers, 351-356 (note).

Percy v. Millaudon, 10 Mart. (La.) 68 (8 N. S.)

Cited Wharton, 510.

3.

It was not necessary to bring an action under the section referred to (5239) to forfeit the bank's charter before the individual liability created by this statute attaches.

Thompson on Corporations, sec. 4303.

"The object of this provision of the Currency Act was "to guard national banks from the hazard of loaning "money in improvident amounts upon speculative and "accommodation paper," though it contemplated and permitted to an unlimited amount the discount of paper used and required in facilitating the transfer of property and money in the transaction of the legitimate "business of the country."

Second N. B. v. Burt, 93 N. Y. 233.

If in this or any action the facts show a case within the terms of this section, to-wit, a violation of any of the provisions of the title relating to national banks, and an assent thereto by any of the directors, such director defendant is severally and personally liable, and judgment is properly entered against him for all damages suffered or

sustained by the bank or any person in consequencec of such violation.

Wells v. Graves, 41 Fed. Rep. 459.

Thompson Com. on Corps., 4113, 4273-4278.

Stephens v. Overholtz, supra.

Clews v. Bardon, supra.

Such several and personal liability the Supreme Court of the State denied in this cause, declaring that the only cause of action was a joint negligence, actionable as a tort at common law.

The denial of plaintiff's right asserted on behalf of plaintiff in error to recover the whole loss on these three unauthorized loans, and to have a several judgment against defendant in error for this, gives this Court jurisdiction.

This Court would have jurisdiction to examine and review the judgment, even if it should hold later that a suit by the comptroller to forfeit the bank's charter be a perequisite to the enforcement of this individual liability.

Bailey v. Mosher, 63 Fed. Rep. 488 (27 U. S. A. 339.)

Even if the other two transactions are not strictly loans, and therefore not violations of the statute, there is no dispute over the one with Wickam.

The complaint alleges (marg., p. 16) that he, Wickam, "borrowed" large sums of money, aggregating $45,000, of which $35,000 was unsecured and was lost.

Finding 10 (pp. 83-84) is that he was a man of bad repute; that he "borrowed" by connivance with the cashier

$45,000; that the president knew of this, and had been warned against dealing with this man (pp. 80-83-85). This transaction was a total loss to the bank of the whole sum loaned, $45,000. (Marg., p. 84, findings.)

Here is a plain case of a violation of section 5200 and of individual liability, under section 5239, resting on the president. There is perhaps a violation of section 5209, but we do not claim a civil liability under that, as was attempted in Whittemore v. Amoskeag Bank.

Under the facts here set up, plaintiff could and did claim the right under these sections to a several judgment of at least $45,000 against the defendant in error.

This right being denied, this Court has jurisdiction of the whole case.

The particular sections of the statute under which the plaintiff's claim is made need not be specified, or copied into the pleading or other part of the record.

It is sufficient if it appear by necessary intendment that this right to hold director Thomas severally liable for the damages sustained by the corporation by reason of these violations of the federal statute was involved in the decision, and was in effect denied by the State Court.

Bridge proprs. v. Hoboken, 1 Wall, 116.

Kaukanna W. Co. v. Green Bay Co., 142 U. S. 254.

Furman v. Nicoll, 8 Wall, 44.

Crowell v. Randall, 10 Pet. 368.

Armstrong v. Treasuries, 16 Pet. 281.

Beer Co. v. Massachusetts, 97 U. S. 25.
Chicago Co. v. Needles, 113 U. S. 574.
Hickie v. Starkie, 1 Pet. 94.
Murray v. Charleston town, 96 U. S. 442.
Detroit Bay v. Guthard, 114 U. S. 136.
Eureka Lake Co. v. Yuba Co. 116 U. S. 410.
Arrowsmith v. Hamoning, 118 U. S. 194.
Murdock v. Memphis, 20 Wall. 636.
Minnesota v. Batchelder, 1 Wall. 109.
Dooley v. Smith, 13 Wall. 604.
Legal Tender Cases, 110 U. S. 438.
Davis v. Packard, 6 Pet. 4.
Woodruff v. Mississippi, 162 U. S. 292, 298.

We submit that this court has jurisdiction; that the decision of the Supreme Court of the State of California, reversing such several judgment against director Thomas, and awarding him a judgment against plaintiff and the bank, declaring all liability in or upon him, under the facts pleaded and proven, at an end, was an error for which this Court will reverse that decision and direct that the judgment of the trial court stand.

THIRD POINT.

The action was not simply in form equitable. It was a bill in equity in Cause and Substance as well as in form. Such suits are a well recognized branch of equity jurisdiction: The right to bring such action in equity was a right possessed by the corporation; the fact that this is a bill in equity filed by a stockholder

makes the proceeding a suit in equity and one in which it was error to apply doctrines of retraxit and the like; but the suit is an equitable proceeding for the first reason and would be so if begun by the corporation itself without the intervention of the stockholder as plaintiff.

Though brought under the code system the old rules of equity jurisprudence determine the character of the action.

"The new process was not intended to affect and does "not affect the differences which have heretofore ex- "isted and still exist between the separate departments "of 'law and equity'; it is not intended to affect and does "not affect settled principles, doctrines and rules of "equity." Pomeroy's Eq. Jur., 84, 354.

The Supreme Court in California has jurisdiction in Equity and entertains all suits formerly sanctioned by the English High Court of Chancery. The differences between legal and equitable causes of action are still maintained.

Dewitt v. Hayes, 2 Cal. 468.
Smith v. Rowe, 4 Cal. 6.
People v. Davidson, 30 Cal. 379.
Willis v. Farley, 24 Cal. 490.
Smith v. Smith, 88 Cal. 572.
Rosenberg v. Frank, 58 Cal. 387.
Wickersham v. Crittenden, 106 Cal. 327-8.
Peters v. Delaplaine, 49 N. Y. 37.
Stevens v. Mayor, 84 N. Y. 296.

Moore v. Copp, Decided Dec. 27, 1897, Supreme Ct. California.

"If the facts stated show that the primary rights or "cause of action, or the remedy to be obtained are equit- "able, then the action itself is equitable, governed by "doctrines of equity jurisprudence, and falling within the "equity jurisdiction of this court." (Pomeroy, 354.)

Empire St. B. v. Beard, 88 N. Y. 189-191; citing 49 N. Y. 37; 84 ib. 96.

The language of the opinion of the State Supreme Court in the case at bar is an admission that this proceeding is equitable, being brought by a stockholder; but the Court say:

"This action, while in form pertaining to equity, is in "its cause and substance a legal action to recover dam- "ages for tort against the three defendants, pleaded as "joint tort-feasors."

And the Court proceed to quote from Morawetz on Corporations (sec. 271), that a suit of this character is governed by legal, not equitable rules; and thereafter to apply doctrines of misjoinder, retraxit, variance and release of joint debtors or tort-feasors, never applied or sanctioned by any court of equity.

The text of the author is not borne out by the authority he cites in support of his doctrine, if it be taken to have the meaning and force given it in the application hereto made. We admit that equity follows the law in purely legal or statutory matters, such as limitations,

succession, heirship and the like; but we cannot admit that a court of equity follows the law in its antiquated rules drawn from and depending on the effect of seals, etc., etc., or the special common law rules of practice, depending on the form of the declaration, plea, or other proceeding. These are exactly what equity sought to remedy and the codes sought to abolish.

1 Pomeroy's Equity, Sec. 427.

Thompson's Liability of Officers, p. 354.

The single decision cited by the author (Morawetz) to support this doctrine of the text, is an entirely different proceeding from that mentioned in the text and from that in the case at bar.

The only case he cites is

Pierson v. McCurdy, 33 Hun. 520.

This was a suit by a receiver appointed to manage the affairs of a corporation.

It was there held that the fact that the proceeding was brought by such receiver did not prevent the application of the limitations laid down in the statute for legal as distinguished from equitable causes of action.

No one will dispute that doctrine; but that does not warrant a court in holding that a bill in equity filed by a stockholder is in effect but a proceeding at law subject to technical common-law rules of practice, including variance, misjoinder of parties and causes of action, to be classed as ex contractu or ex delictu as if it were a de-

claration at common law—one in which a joint judgment or no judgment at all must imperatively be entered holding all equally liable, or releasing all; a suit in which the court, though possessing full equity and statutory authority so to do, cannot permit a dismissal as to one—without entitling all defendants to a release and dismissal.

The doctrine thus deduced from the language of the text is almost preposterous. It is certainly not warranted by the authority of the text-writer or the decisions cited by the author.

The text is further open to doubt as a correct statement of principle.

The author in his own note refers to another case in the same State, where such a suit is held to be an equitable proceeding in all respects. No comment is made, but the reference shows that there are limitations on the doctrine as stated in the text; that the author himself had doubts of the correctness of the statement in the text; at least that all authorities do not agree with his view.

The case cited is

> Brinkerhoff v. Bostwick, 88 N. Y. 52, 99 N. Y. 193, and 105 N. Y. 572.

This case is of high authority; it is cited as such in almost every later opinion touching the questions involved; distinguishes the case of Hun v. Cary, cited by Hon Justice Henshaw in support of his decision now under review, and distinctly decides that a proceeding such as this at bar is a suit in equity.

There is one later case in point in New York on this head. We refer to

O'Brien v. Fitzgerald, 143 N. Y. 377.

In that case the Court undertake to show that Hun v. Cary is not overruled, and to reconcile these two cases last mentioned; but it is admitted there that Brinkerhoff v. Bostwick was without a doubt a case of a bill in equity as it had been held.

We contend that the case at bar is essentially equitable in all its features; that it is a "bill in equity for an accounting," as it is entitled. Such action in California is equitable.

Wickersham v. Crittenden, 106 Cal. 327.
Fox v. Hale & Norcross, 108 Cal. 475-478.

The action is against three different directors and officers, "trustees" and confidential agents of a corporation. It sets forth their various duties under the bank's by-laws. It gives as far as plaintiff is able a history of a course of dealings with the funds of the bank which constitute breaches of the trust imposed on defendants.

It is filed by one stockholder, not simply on behalf of the corporation, but as a representative of all stockholders who may desire to come in. The trial necessitated an examination of all books and papers and accounts of the bank; and for that purpose a reference became necessary and was ordered. A discovery was necessary, for the

facts were peculiarly within the knowledge of the delinquent officers, who were still directors, responsible to and in control of the bank (Robinson v. Hall, 25 U. S. App. 56) subject only to the receivership.

It was against three officers and directors. One, the president, was a mandatary receiving a salary, as well as trustee and member of the executive committee of the directors. Being under different degrees of responsibility, having different duties and rights, they might well be held liable in equity in different amounts.

Fox v. Hale & Norcross, supra.

Sayles v. Cent. Bk. of Rome, 41 N. Y. Sup. 1063 (on authority of Brinkerhoff v. Bostwick, 105 N. Y. 571.)

Ackerman v. Halsey, 37 N. J. Eq. 356.

Empire St. B. v. Beard, 88 N. Y. Supreme Ct. 192.

Land Cr. etc. Co. v. Fermoy, L. R. 5 Ch. 763.

A great number of transactions are set up in the bill as grounds for relief. There is not a cause of action such as a jury could try, as in Hun v. Cary, where but one transaction resulting in loss was alleged, a purchase of land which swamped the bank. Here a course of dealing covering a long period of time, is alleged as to many and proven as to at least three customers. The avoidance of a multiplicity of suits in such case gives equity jurisdiction.

Empire S. B. v. Beard, 88 N. Y. Sup. Ct. 191.

The last six months of the bank's life, and much of the time before that was necessarily examined into at the trial.

One other special ground for equitable jurisdiction is shown in the inequalities resulting from the assessment of $37.50 per share levied by the comptroller. All the stockholders save defendant in error paid this in full. He still owes $20,000.00 on his shares of stock. This assessment is alleged as one of the results of defendants' acts and omissions, an element in the damages, one of the losses of the bank and its stockholders.

Such assessment cannot be enforced after payment of the debts of the bank, which have been all paid. (See record in case 276).

The comptroller can enforce the individual liability of stockholders only so far as it is necessary to pay debts. (5234 R. S.)

Any money therefore recovered in this case should go to reimburse the stockholders who have paid a greater proportion of the assessment. A court of equity has power to adminster upon a fund recovered as was the fund in this case, where a court of law could not remedy such inequalities.

Fox v. Hale & Norcross, 108 Cal. 475.

Kennedy v. Gibson, 8 Wall. 503.

Thompson on Corporations, 4560.

The authorities with hardly any dissent agree that suits such as this against directors of a corporation to compel them to disclose what

they have done in the course of their employment, to give an account of their stewardship, and to make good losses due to their neglect of duty or fraud are peculiarly within the jurisdiction of a court of equity.

Pomeroy's Equity Jur. Vol. III, sec. 1088-1090, p. 4 (n. 1.).

This applies to suits brought by the corporation itself directly against its directors as well as to stockholders' suits.

Robinson v. Hall, 25 U. S. App. 480.

Trustees v. Bossieux, 3 F. R. 830, citing a host of authorities on the point; Ackerman v. Halsey, 37 N. J. Eq. 356; Wilkinson v. Dodd, 40 N.J. Eq. 142; Williams v. McKay, 40 N.J. 198; Williams v. Mc Donald, 42 N. J. 396; Brinkerhoff v. Bostwick, 88 N. Y. 58-9-105 N. Y. 571; Hand v. Atlantic Bank, 55 How. Pr. 231; Leeds Estate v. Shepherd, L. R. 36 Ch. Div. 787-88; Concha v. Marietta, 40 Ch. Div. 553; Stephens v. Overholtz, 43 F. R. 465; Neal v. Hill, 16 Cal. 146; Landis v. S. I. C. H. Co. 31 Atl. Rep. Rep. 755; Thompson on Liability of Officers of Corporations, 351-356 (n); 3 Pomeroy Eq. 1094, 1420, 1421; Lawson's Rights and Remedies, 521; Pratt's Dig. (Nat. Banks) p. 67, 70; Charitable Co. v. Sutton, 2 Atk. 400, 406.

In Briggs v. Spaulding, the leading case on this subject, while the directors there on the special facts of the case were exonerated from liability, the jurisdiction of

equity to entertain the bill was not questioned. (141 U. S. 133).

N. H. B. L. A. v. Childs, 82 Wisc. 475.

Empire St. Bank vs. Beard, 88 N. Y. Supreme Ct. 189.

"It is well settled that where there has been waste or misappli-"cation of the fnnds of a corporation by its officers or agents, "a suit in equity may be brought IN THE NAME OF THE "CORPORATION to compel them to account for such waste, or "misapplication, or breach of trust, and this is so, ALTHOUGH "THERE MAY BE AN ADEQUATE REMEDY AT LAW." (Thompson on Liab. of Officers, p. 377.)

"In courts of equity, which look more to the sense and sub-"stance than to the mere form of things, they (directors) are "viewed as trustees, either of the corporation as an artificial body, "or the aggregate body of shareholders." (Ibid, p. 351).

"It being a conceded doctrine of courts of equity that the di-"rectors of corporations are trustees for the shareholders, it "would seem to follow, as a matter of course, that courts of equity "would entertain a bill brought by a shareholder against di-"rectors for relief on account of frauds and breaches of trust." (Ibid, p. 382; Citizens' Loan Soc. v. Lyon, 29 N. J. Eq. 110; "Forbes v. Whitlock, 3 Edw. Ch. 446).

The action brought by plaintiff is the equitable action of accounting against trustees. (Cook on Stockholders, 701, 741 and notes).

"Where confidence is reposed, or the matters are peculiarly "within the agent's knowledge, the action in equity lies, as "against trustees (including directors). Such suits are peculiarly "of equitable cognizance."

3 Pomeroy Eq., sec. 1421 (1420), p. 472 (n. 4.), p. 473 "(n. 1.); Thompson on Corporations, 4605; Empire "State Bank v. Beard, supra; Makepeace v. Rogers, 11 "Jur. N. S. 215; Hennings v. Pugh, 4 Giff. 456; Mackenzie v. Johnston, 4 Madd. 373; Moxon v. Bright, L. "R. 4 Ch. Div. 292; Southampton Dock Co. v. S. etc. "Board, 11 L. R. Eq. 254; Peabody v. Flint, 6 Allen, 52 "—where it is said: 'As between the company and its "officers it was long since held that they were trustees, "and that a court of equity would hold them respon- "sible for every breach of trust"; Thornton v. Thorn- "ton, 31 Gratt. (Va.) 212; Taylor v. Thompkins, 2 "Heisk. (Tenn.), 89; Hodges v. N. E. S. Co., 1 R. I. "312; Kerr v. Camden S. Co., Cheeves Eq. (S. C.) 189; "Halstead v. Rabb, 8 Porter (Ala) 63; Hale v. Hale, 4 "Humph. (Tenn.) 183; Gibbons v. Anderson, 80 F. R. "345; Brinkerhoff v. Bostwick, 88 N. Y. 52 (99 N. Y. "193), 105 N. Y. 572; Sayles v. Central Bank of Rome, "41 N. Y. Sup. 1063; Robinson v. Smith, 3 Paige, 222; "Horn S. M. Co. v. Ryan, 42 Minn. 196; Citizens L. A. "v. Lyon, 39 N. J. Eq. 110; Ackerman v. Halsey, 37 N. "J. Eq. 356; Williams v. Halliard, 38 N. J. Eq. 373; "Witters v. Sowles, 31 F. R., 1 and 5."

We would respectfully call special attention to the case of Brinkerhoff v. Bostwick, 105 N. Y. 571, and to the remarks of Hon. Justice Peckham in that opinion distinguishing the case of Hun v. Cary.

In Hand v. Atlantic Bank (55 How. Pr. 231) the opinion by Barrett, J., seems to have been written with special reference to this case, and is as follows:

"The complaint, in its general features, is good upon the au- "thority of Robinson v. Smith (3 Paige 222). But one cause of

"action is stated; in substance the gross negligence of the trus-
"tees, resulting in the waste and loss of the corporate assets.
"The assessment upon the stockholders is not averred as a dis-
"tinct cause of action, but as a special element of damage. Pos-
"sibly it may not be cognizable as such in an equity suit of this
"nature, but that is a question for the hearing. Ordinarily the
"corporation should file the bill, but the stockholders may do
"so, where, as here, the corporation is still under control of the
"accused trustees. In the latter case, the corporation is a ne-
"cessary party defendant."

"But in our judgment, the receiver should also have been
"joined, and the court will see that he is brought in before
"final judgment. The trustees are entitled to have all possible
"claims against them settled in the one suit.

"And the presence of the receiver is necessary to a complete
"determination of the controversy."

"The defendant corporation, however, cannot demur upon
"that ground, for the reason that it has no interest in the join-
"der. (Hillman v. Hillman, 14 How. 456; Newbold v. Warrin, 14
"Abb. Pr. 80.)

"There must be judgment overruling the demurrer with costs,
"but with leave to withdraw the demurrer and answer over with-
"in 20 days, upon payment of costs.

"The facts of each case must govern, and if it is doubtful
"whether adequate relief could be obtained at law, equity should
"entertain jurisdiction." (Pomeroy Eq. sec. 1421 (n. 4.)

Another brief and pointed opinion is in Ct. Loan Assn. v. Lyon et al. We give it in full:

"The Chancellor—The bill seeks to fix and enforce the per-
"sonal liabilities of the defendants for their misfeasance as di-
"rectors of the complainants, in lending without security, and
"so in violation of one of the by-laws of the complainants, a
"large sum of money belonging to the complainants which was
"thereby lost. The only point discussed on the argument of

"the demurrer was whether the complainants have not an ade-
"quate and ready remedy at law. If it be conceded that such
"remedy at law exists this Court is not thereby ousted of its
"jurisdiction on the subject, which belongs to its ordinary and
"ancient jurisdiction over trusts.

"Where there has been a waste or misapplication of the funds
"of a corporation by the officers or agents of the corporation, a
"suit in equity may be brought in the name of the company to
"compel them to account for such waste or misapplication or
"breach of trust. (A. & A. on Corp. sec. 312; Atty. Gen. v. Utica
"I. Co., 2 John. Ch. 371-389; Bayless v Orne, Freem. Ch. 161-
"173; Atty. Gen. v. Wilson, 1 Cr. & Ph. 2.) The demurrer will
"be overruled with costs." (29 N. J. Eq. 111.)

Such suit states no cause of action at common law; the facts alleged do not constitute a "tort" actionable at law.

16 Am. & Eng. Ency. of Law, p. 388 (n. 7).

In Trustees v. Bossieux, supra, which was an action precisely similar in the main to this, the Court say:

(831) "In this case, where the losses were not directly
"caused by the negligence of the defendants, but were
"the results of acts of officers, committed in consequence
"of the negligence of the directors (defendants), no action
"at law for tort lies."

If the common-law right of action existed, the corporation has still the right to go into equity, particularly if the facts are complicated accounts, intricate, long, or involved; and in this action plaintiff has in the prayer for equitable relief, as well as in title and the facts pleaded, shown his election to pursue the remedy in equity.

The authorities are overwhelming on the point that equity has jurisdiction of this action, and in this connec-

tion it may be said that if there is any conflict between the New York cases, the case of O'Brien v. Fitzgerald is less in accord with the general consensus of authorities than the hotly contested case of Brinkerhoff v. Bostwick. The latter we submit, states the law correctly on this point.

Where the cause of action is a failure to prevent the acts of others, mere nonfeasance and the law of contracts or torts gives no adequate remedy. (Trustees v. Bossieux). Equity, which will suffer no wrong without a remedy, acting upon the duties imposed by the by-laws, under the statutes of the United States, gives the bank the right to call its trustees to account, and to measure their acts by the standard of the by-laws and laws of the United States.

Plaintiff in error had, under the United States statute, the right to sue in equity. Plaintiff claimed that right for the Bank in this suit under the federal law, by the form of his declaration (or bill) counting on the duties in the by-laws. The judgment of the State Supreme Court in this cause denied plaintiff that right so secured, the facts showing a case within the cognizance of equity.

In this the Court erred, and by that error also, we think, gave this Court jurisdiction.

Be that as it may, this Court, having jurisdiction on other grounds, (by reason of other rights denied), will reverse the judgment of the State Supreme Court herein, for the error in holding the suit to be a mere suit at law, and in applying rules applicable only to common-law actions ex delictu.

If the action is not a legal action, or on a legal cause of action purely to recover damages for a tort cognizable at common law alone, then the release of Thomas could not be, and was not, affected by the dismissals of his co-defendants; and in reversing the judgment of the trial court on this ground, and ordering final judgment in favor of the defendant in error the Supreme Court of the State erred. The doctrine of retraxit here applied is thus characterized by one text-writer: "This is one of those technical and "senseless things which abounded in the old law, and "which has nearly fallen into disuse." (Van Fleet For. Ad., vol. 1, p. 173, ff. secs. 50-51.)

It is peculiarly a doctrine of the common-law courts, and unknown in equity.

A retraxit at common law was attended with peculiar formalities. "A retraxit is ever when the demandant or plaintiff is present in Court." Judgment entered thereon barred any further action against the defendant.

A court of equity recognized no such proceeding; its order or judgment of dismissal was or was not a bar to a future action, according to whether it was considered as on the merits or not. It never had the effect given the dismissals in this cause. It was not a satisfaction.

A court of equity had power always to give judgment for or against one or more defendants, without affecting the case of others before it, to dismiss as to one or all, as it saw fit—to dismiss as to some and retain the suit as to others.

Daniel Ch. Pr. (dis.), 659.

The statute of this State gives this power expressly to the Superior Court in proper cases.

C. C. P. 578: "Judgment may be given for or against one "or more of several plaintiffs, and for or against one or "more of several defendants; and it may, when the justice "of the case requires it, determine the ultimate rights of "the parties on each side, as between themselves."

Sec. 581: "An action may be dismissed, or a judgment "of nonsuit entered by either party upon the written consent of the other."

This cause had been tried and submitted.

The trial court had power to enter up separate judgments against the defendants in different amounts, or to exonerate some and hold others liable on the testimony.

Fox v. Hale & Norcross, 108 Cal. 370-427.

Ackeman v. Halsey, supra.

Sayles v. Central Bank, supra, citing Brinkerhoff v. Bostwick, 105 N. Y. 572.

The proceeding in this case amounted to a recovery in equity in different amounts, and the partial satisfaction of the cause of action. It was distinctly adjudged by the trial court to be a payment, not of the total claim for which defendant in error was held liable (Findings, 15, 16), but "on account" merely.

There is not the slightest evidence in the record to show that it was an accord and satisfaction, or intended as a satisfaction, except pro tanto. It was argued in the State Court "on account of" meant here by reason of or in lieu

or in satisfaction of. But the language of findings 15 and 16 is perfectly clear with or without these words. The total loss is given, the amount paid thereof and the net loss being balance unpaid of the total loss found. There is no ambiguity in the language.

Even at common law, in the time of Charles the Second, Coke, J., held a retraxit of the action in a former suit, as to one of two or more defendants sued in the same action, not to be a release, but only a bar to another action against such defendant. So of a nolle prosequi as to one of two defendants in the same action of trespass.

Robinson's Practice, 182, where "retraxit" is discussed under the head of "plea of res judicata." (See case cited, post, 4th point.)

Archibald's Civil Pr. 1515: A retraxit differed only from a nolle prosequi in being a bar.

That may be admitted, that any further action against the dismissed defendants is barred. To that extent the case of Merritt v. Campbell, cited in the decision below, went and no farther. The dismissal in that case was held to bar another action against the same parties. It was not held to be equal to or amount to an accord and satisfaction, or a satisfaction at all. It was a judgment for defendant, not a release.

So the judges of King Charles' time say: It is not a release, only quasi, by reason of barring another action.

In a court of equity such a question could never arise. Equity looks to the intent, and gives effect to the intent

of the parties, and pays no attention to, but disregards, forms.

This proceeding, then, it being in a court of equity, in fact equitable as well as in form, amounted to just what the trial court adjudged, a partial payment, to that extent relieving defendant in error from a liability which, but for such part payment would have been entered up as a judgment against him in the full amount.

Equity looks to the intent. The intent of the parties to this transaction is plain. The decision ignores that—is directly contrary to the intent of all parties, the trial court included. There is no virtue in the word "retraxit" that makes it, even at common law, a release or satisfaction. It is not, and never was, fully equivalent to that even in ancient common law courts.

The spectacle of a modern court having both equitable and common-law powers rejecting the former and insisting that it must be bound by the latter, is a distinct failure of the codes of practice to effect the reforms they were intended to bring about.

We submit the dismissals amounted to a bar, if that is what is meant by a "retraxit," they did not amount to a complete release; they could not in equity be equal to an accord and satisfaction, if that is the meaning of retraxit.

Whatever the meaning of the word as here used, the steps taken in this case to dismiss Thompson and Wilson did not effect a satisfaction or release of the claim as against Thomas.

A breach of trust is not a tort in equity; it gives rise to a debt; and a suit in equity waives the tort if such there be.

This action is equitable on the authority of Brinkerhoff v. Bostwick, and is one to which none of the common-law doctrines of tort can apply.

It is to recover for breaches of trust. The authorities are almost unanimous that such is its nature. The doctrines, therefore, deduced from the assumed relation of "joint tort feasors" cannot apply or suffice to release defendant in error.

A breach of trust is not a tort, but in equity, whether the trustee profit by it or not it gives rise to an equitable debt.

> Perry on Trusts, 260-843-847, and cases there cited.
> Lewin on Trusts, 205-206-906.

It is not barred or released by the death of the debtor (the trustee). (See cases cited above.) It is enforceable against his estate. (40 N. J. E. L. 142.) It is a simple contract debt or a specialty debt, depending upon the character of the instrument creating the trust. The trust and the contract may be implied, but the rule holds good.

It is a debt within the meaning of the statute quoted above, which prohibits the Court from holding one released by the release of a joint debtor. If the defendants are only jointly liable and must be held equally liable or

not liable at all, still they are not all released, in equity, by release of one or two out of three.

That the judgment in this cause was claimed and given on the equitable or contract theory appears from the claim in the prayer) to interest from the date of the losses which is granted by the trial court in its judgment. (Rec., m. p. 24, 90.)

Equity deals with trust and contractual relations solely, and torts, as such, are not of equitable cognizance. (1 Jaggard, 15.) So, in the case at bar, plaintiff sought to recover on the contractual relations existing, framing his complaint in equity accordingly.

We wish to cite one more decision:

Vance v. Mottley, 92 Tenn. 310.

A suit in equity for negligence and fraud against the estate of a cashier, where it is held (p. 318): "The tort may "be waived and an action for the value maintained "against the wrongdoer or his representative." We have discussed this equitable character of the action at perhaps unnecessary length. But the grave assumption by the State Court that this action is, and must be, in cause and substance, legal and not equitable, seemed to require of us a demonstration to the contrary.

MINOR OBJECTIONS TO THE FORM OF THE PLAINTIFF'S BILL.

In the light of these principles of equity and the authorities cited above, the objections of misjoinder and vari-

ance suggested by the Supreme Court of the State in its judgment as grounds for reversing the judgment of the trial court, and remanding for new trial, become of no moment.

The charge of a common intent, seized upon in the opinion of the Court as stamping the action clearly one in tort, and partaking of the nature of a fraud, is of no consequence in equity. It is but the well-known and time-honored "General Confederacy clause," 372-3 (n), Dan. Ch:

"The general charge of fraudulent combination known "as the general charge of confederacy, is usually inserted "in bills, yet it is treated as mere surplusage."

"The plaintiff is given leave to omit the common confederacy clause." (21st Eq. rule U. S. Supreme Ct., Jany. term, 1842.)

Its insertion in the bill here is but an adherence to old equitable forms, and far from showing defendants guilty of a tort, rather stamps the pleading as one in equity and not a common-law declaration.

The suit being in equity governed by equitable principles, it was proper to unite all three defendants and the bill charges but one cause of action.

Hand v. Atlantic Bank, supra.
Wickersham v. Crittenden, 93 Cal. 17.
Bailey v. Mosher, 63 Fed. Rep. 488. (27 U. S. A. 339.)

We submit the judgment of this Court should reverse that of the Supreme Court of the State, and direct that

of the trial court to stand as the final judgment of the Court herein.

If the suit were in cause and substance a legal action, a mere suit at law, and not one to recover for breach of contract or of trust, but one to recover damages for a pure tort, this Court would still have jurisdiction.

Defendant in error would not be released by the acts of plaintiff or the proceedings in the trial court, and the judgment of the appellate court so deciding should be reversed.

A. First of the Jurisdiction.

In this action plaintiff claimed the right to unite all three defendants, and to dismiss two and hold the third; the right to distinguish between the liability of the different defendants, and to collect more from one than from the others; the right to hold the president personally, individually, and severally liable, and to make him responsible for the whole loss caused by the acts and omissions of the cashier.

Let it be admitted that the loss is due to negligence or tort of defendants, yet the negligence is simply the failure to perform the duties imposed by the by-laws upon the bank's officers.

Such failure may be negligence per se, as in case of a duty imposed by municipal ordinance, contract, and the like.

Buckley v. Gray, 110 Cal. 339.

Armstrong v. Luco, 102 Cal. 272.

McKune v. S. C. V. M. & L. Co., 110 Cal. 480.
Burrows v. Marsh Gas Co., supra.

No definition of negligence is possible. It may be a failure to obey positive instructions, or to perform general duties. (Mechem on Agency, 484, 488.) But since the by-laws create the duties, the rights claimed (always the correlative of the duties imposed) are based upon and claimed under the statute of the United States, giving authority to define that duty.

The acts of July 12, 1882 (22 Stat. 163) and Aug. 13, 1888, (25 Stat. 434-436), do not deprive this court of jurisdiction in such case.

Walker v. Windsor Bk., 56 Fed. Rep. 76-80.
Westervelt v. Mohrenstecken, 40 U. S. App. 230;
Sowles v. Bank, 46 Fed. Rep. 513.

The Act of 1882 read:

"The jurisdiction for suits hereafter brought by or against any "association established under any law providing for national "banking associations, except suits between them and the United "States, or its officers and agents shall be the same as and not "other than the jurisdiction for suits by or against banks not "organized under any law of the United States which do or "might do banking business when such suits may be begun."

This does not interfere with the jurisdiction of this Court to entertain a writ of error to review the decree of a State court wherein a right claimed under federal law is denied.

We will suppose the existence of the Bank, its right to do business or to sue at all were denied, and the cause dismissed because it had not organized properly. In such case the strict language of the statute would never be applied or held to mean that because this Court could not have jurisdiction of such a writ in case of a state Bank—claiming its right to exist under state laws—therefore the writ would not lie in case of a national Bank.

Unless such extreme meaning be given to that act, this Court has jurisdiction by reason of the rights and immunities claimed herein, since every claim the Bank makes is made under and by virtue of the statute. (Osborn v. Bank, 9 Wheaton.)

The case of Ex parte Jones, 164 U. S. 691, and the discussion there applies solely to United States District and Circuit Courts and appeals therefrom.

The Act of Aug. 13, 1888, is as follows:

"Sec. 4.—That all national Banking associations estab-"lished under the laws of the United States, shall for the "purposes of all actions by or against them, real, personal, "or mixed, and all suits in equity, be deemed citizens of "the States in which they are respectively located.

"And in such cases the Circuit and District Courts shall "not have jurisdiction other than such as they would "have in cases between individual citizens of the same "State.

The provisions of this section shall not be held to af-"fect the jurisdiction of the courts of the United States in "cases commenced by the United States, or by direction of

"any officers thereof, or cases for winding up the affairs of "any such Bank."

25 Stat. 436.

This late act is expressly limited to suits brought in the U. S. Circuit or District Courts, by or against such banks, making them citizens of the State for such purposes.

This act repeals the former act of July 12, 1882. (Ex parte Jones, supra.)

Neither act seeks directly to limit the jurisdiction of this Court under sec. 709 of Revised Statutes. An implication or inference in a subsequent statute will not suffice to limit the jurisdiction of a Court given by express statute. Repeal or amendment by implication is not favored.

Rosecrans v. United States, 165 U. S. 257.

United States v. Cook Co., N. B. 2 N. B. C., 128.

The question of diverse citizenship does not enter into the case. It may be admitted that plaintiff in error is a citizen of California without ousting the jurisdiction of this Court.

In Petri v. The Bank, it is said in the opinion by Fuller, C. J.:

"So far as the mere source of its incorporation rendered "suits to which a national bank might be a party cogni- "zable by the Circuit Courts, that was taken away, but the "jurisdiction which those Courts might exercise in such "suits between citizens of different states or under the "constitution or laws of the United States, except in that "respect remained unchanged." (142 U. S. 649.)

In McCormick v. Market Bank, 165 U. S. 538, decided Mar. 1, 1897, per Gray, J., the claim made by a plaintiff that a lease executed by a national bank before the comptroller had authorized it to begin business bound the bank being denied, gives the Court jurisdiction.

In Hussman v. Durham, 165 U. S. 147, where the State Court held the equitable title conveyed by proceedings in the United States land office and tax titles based thereon to be invalid, this Court say it is apparent that a right claimed under the authority of the United States is denied, and this Court has jurisdiction. The same is true in the case at bar.

It is further submitted that we have made out a case under section 5329.

Certainly the right to compel defendant in error to respond individually and to make good out of his private means all the losses of the Bank charged in the bill and found in the decision denied by the State Court, is based upon the Federal statute and claimed thereunder in this action.

Eliminate the opinion of the State Court entirely from the record, and the right so claimed is denied. The sophistry of the opinion cannot destroy its effect as a judgment nor take away the jurisdiction of this Court to review it where it denies rights claimed under Federal law.

We submit that the mere denial of the prayer of a national bank for judgment in any case in a state court of last resort gives this Court jurisdiction to issue a writ of error.

Certainly where rights are claimed by virtue of the by-laws of the bank under sections 5133-5136, Rev. Stat., and denied as in this case, a right to review the decision by writ of error is given by section 709. The case is one arising under the laws of the United States. See quotation (ante) from

Witters v. Foster, 26 Fed. Rep. 737.
Metropolitan Bank v. Claggett, 141 U. S. 520.
McNulta v. Lochridge, ib. 327.

B. Regarding the Dismissals in the Trial Court.

The State Supreme Court failed to distinguish between a release and a satisfaction. The former is not the equivalent of the latter. The latter, when given to one has been held to discharge all parties, to inure to the benefit of all; the former not so, unless it was a sealed release which at common law imparted full and adequate compenstion, to wit, a full satisfaction.

A retraxit was at common law neither a release nor a satisfaction, but a quasi release because it was a bar to a new action. A nolle prosequi might or might not amount to a bar; it was not a satisfaction.

Dennis v. Payne, March 18, 1895.

"The bond being of P. Sr. and P. Jr., and the retraxit "being as to P. Jr., it was argued by Maynard for the de-"fendant that it was a discharge of P. Sr., also for it doth "amount to a release and it is clear a release to one shall "discharge both." Rolls, contrary, "that it goeth only by

"way of estoppel, and not as a release, and therefore shall "not bar." Barkeley, J., "that it amounts to a release and "shall therefore discharge both (7 E. 4).

Hickmot's case in the 9th Rep. (52 b: "The plaintiff shall "not have judgment where he hath no cause of action, and "therefore he shall not have judgment. Further, a re- "traxit is not an estoppel but a bar of the action. Be- "sides, here he hath altered the deed, and it is not joint "as it was before like as when he interlines it or the like; "there the deed is altered by his own act, and therefore the "other shall take advantage of it." Cook J., contrary: "For it is not a release, but a quasi release, and if the ob- "ligee sueth one, and covenanteth that he will not farther "sue him, the same is in the nature of a release, and yet (21 H. S.) there ought to be an actual release, of which "the other shall not take advantage of it. So in this case "because it is but in the nature of an estoppel the other "shall not take advantage of it."

From the report of this case by Croke (S. C. Cro. Car. 551) we quote the following:

"I inclined to that opinion, that it is neither a release "in fact nor in law, but quasi an agreement that he will "no further prosecute; and it may be, the said J. P., Jr., "paid the moiety of the said debt and the obligee agreed "to accept it of him and that he would no further proceed "against him, and being jointly and severally bound, he "might make such an agreement and not discharge the "bond."

Retraxit was equivalent to a general verdict in defend- ant's favor.

Prinner v. Edwards, 6 Rand. 677.

So in Walsh v. Bishop (trespass for battery against two) Croke Car. 239-243:

"The errors insisted on were: First that the jury ought "not to have given several but joint damages; and sec- "ondly, that the entry of a nolle prosequi before judg- "ment is quasi a confession of his action to be false "against one, or a release to him, which being before judg- "ment is, as it were a release to both. But the Court (ab- "sent Jones) conceived that there was not error in either "of them. For first, when the plaintiff hath relinquished "his suit against the one, although in truth there ought to "have been inquisition but once of the damages, and not "severally, yet it is not material when no advantage is "taken thereof; and as to the second, it is not a confession "that this writ is false, nor an absolute release to the one, "but it is, as it were, an agreement that he will not pro- "ceed against the one; and his acknowledgment IS AN "ABSOLUTE BAR AS TO HIM, and proceeding may be "had against the other."

A retraxit at common law was probably as to all defendants in a cause or none. But that is a reason why the proceedings in this cause were not a retraxit. They were dismissals entered as to part only of the defendants. At common law they would have been called "nolle pros." (1 Wms. Serg. 207, n. 3.)

It is this use of common law terms that is misleading. As Prof. Pomeroy says in his book on Remedies: "It produces confusion and confusion alone. It was settled law at an early day that nothing short of full payment or a re-

lease under seal would discharge both of two joint contractors, or trespassers."

7 Robin C. Pr. 513.

Walker v. McCullough, 5 Me. (Gr.) 428, and cases cited.

In this state the effect of seals, the rules applied at common law to sealed instruments are abolished.

S. P. v. Von Schmidt, 50 Pac. Rep.

Tracy v. Alvord, 50 Pac. Rep. 757.

Even at common law a release given one would always be construed into a covenant not to sue so as to give effect if possible to the intent and present a release of the others.

The right to proceed against sureties might always be reserved in a release.

7 Rob. Pr. 514-516-518, and cases cited.

Solly v. Forbes, 6 Eng. C. L. 11; 2 Brod. & Bing. 38.

"Courts of law adopting a rule of construction more "equitable than formerly, look to the intention of the par- "ties, and though in the instrument executed to one the "word 'release' is made use of, they will not let it operate "as an absolute and unconditional release to all when it "is followed by words which show the release to be par- "tial and particular, that is to one only (p. 516.)

The Modern Rule.

"A RELEASE OF ONE JOINT TORT FEASOR DOES NOT RELEASE THE OTHERS," but the injured party is entitled to only one satisfaction. It is immaterial whether the satisfaction is obtained after judgment, or by amicable adjustment, without litigation. The essential thing is the satisfaction.

> Jaggard on Torts, vol, 1, page 344, sec. 177—heading of chapter "release."

Further on, in that chapter, the author states the rule, that a covenant not to sue does not release a joint wrongdoer, citing in the note a case decided in Illinois in 1892, which is on all fours with the case at bar, where the rule is distinctly enunciated that THE DISMISSAL OF A CASE AGAINST ONE OF TWO JOINT TORT FEASORS, TOGETHER WITH THE EXECUTION FOR A VALUABLE CONSIDERATION, OF AN AGREEMENT NOT TO SUE HIM, DOES NOT OPERATE AS A RELEASE OF THE OTHER TORT FEASOR.

There must be an express release amounting to an accord and satisfaction.

> City of Chicago v. Babcock, 143 Ill. 358; 32 N. E. 271.

This was an action on the case to recover damages for personal injuries. Appellee recovered judgment for

$1,500, which was affirmed in the appellate court, and, on appeal taken to the Supreme Court, the point made that plaintiff had originally brought his action against another defendant, but had dismissed against him upon receipt of the sum of $150. The Court there say, on page 366:

"Where there are a number of tort feasors, the party injured may, at his election, sue one or several, or all; and where the suit is against one or some of the wrongdoers, but not against all, the person or persons sued have no right to complain. And so, also, where there is suit against several tort feasors, the dismissal of the suit against one does not bar the action against the others (Knapp v. Roche, 94 N. Y. 329; Sloan v. Herrick, 49 Vt. 327; Bloss v. Plymale, 3 W. Va. 393). A release to one of several joint tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. Here there is no claim of a technical release under seal. The pending suit against Le Cardi was dismissed, and a written agreement was signed that no action should be begun against Le Cardi by appellee. This, on its face, was simply an agreement or covenant not to sue. The legal effect of such a covenant is not the same as that of a release. A covenant not to sue a sole tort feasor is, to avoid circuity of action, considered in law discharge, and a bar to an action against such tort feasor. But the rule is otherwise where there are two or more tort feasors, and this covenant is with one of them not to sue him. In such case the covenant does not oper-

ate as a release of either the covenantee or the other tort feasor, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to the action against them.

"THE ONLY GROUND, THEN, THAT APPELLANT "HAD TO STAND ON, IN RESPECT TO THIS "BRANCH OF THE CASE, WAS A CLAIM THAT "THERE WAS AN ACCORD AND SATISFACTION, "and that the $150 was paid and received in satisfaction of "the damages sustaned. IF, AS CLAIMED BY APPEL- "LEE, THE $150 WAS PAID AND RECEIVED SIM- "PLY IN CONSIDERATION OF THE AGREEMENT "NOT TO SUE LE CARDI, AND NOT IN SATISFAC- "TION OF THE DAMAGES, BUT ONLY IN PART "PAYMENT OF THE SAME, then the transactions be- "tween appellee and Le Cardi did not amount to an ac- "cord and satisfaction, and were no bar to the suit against "appellant. In fact, it was for the interest of the latter "that appellee should receive part payment of her claim from Le Cardi, and thereby reduce the amount of dam- "ages recoverable from it. The views we have expressed "are sustained by the following authorities: (Snow v. "Chandler, 10 N. H. 92; Knapp v. Roche, 94 N. Y. 329; "Bloss v. Plymale, 3 W. Va. 393; Sloan v. Herrick, 49 Vt. "327; Brown v. Marsh, 7 id. 320; Chamberlain v. Murphy, "41 id. 110; Ellis v. Esson, 50 Wis. 138; Parmlee v. Law- "rence, 44 Ill. 405.)"

In the case at bar there is no dispute as to the fact that the $27,500 was received simply on account of the damages. The opinion so states, and the Court below distinctly so found. (Findings 15 and 16, supra.)

This doctrine, so clearly decided and unmistakably announced in Illinois, has also received the sanction of the highest court in Wisconsin.

See Pogel v. Mailki, 60 Wis. 248.
Ellis v. Esson, 50 Wis. 138.

The first of these cases was decided in 1884, and is brief but to the point, and we quote from the opinion, page 250:

"Where the trespass is joint, this Court has held that the receipt of money from one, with an agreement not to prosecute him, discharges the others only when such money is received as an accord and satisfaction for the whole injury; but, where it is received only as part satisfaction, it discharges the others only pro tanto (Ellis v. Esson, 50 Wis. 138)."

The case of Ellis v. Esson had been decided four years prior, and is a very carefully considered opinion, making the distinction which we ask this Court to make between cases of tort simpliciter, where damages are not strictly matter of proof, and a case where, as in the case at bar, there is a fixed, legal measure of damages, and holding that in such cases a receipt of part of the amount found due the plaintiff could not amount to a satisfaction, whatever may be the rule in the class of cases where there is no fixed measure of damages.

The Court further discussed, at page 146, the old common law rule that a technical release under seal given by the injured party to one of several joint wrongdoers

operated to release all, showing that that rule is based upon the nature of the release under seal, which, being absolute at common law, could not be controlled by parol evidence, and raised a conclusive presumption that it was given in full satisfaction and upon sufficient consideration.

The rule in Vermont is the same, to wit, that in an action against one of several co-trespassers evidence of payments by any one of them, may be received in evidence, for their effect is to diminish the plaintiff's recovery pro tanto, but unless they were received in full satisfaction of the right of action they would not defeat the suit, but would amount to mere evidence in mitigation of damages.

Chamberlain et al. v. Smith, 41 Vt., 110.

The rule obtains in the State of Maine. One of the early cases, where it is announced, is the case of

McCrillis v. Hawes, 38 Maine, 566,

where a settlement made by one of two joint trespassers for half of the property taken was held not to preclude the owner from maintaining an action against the other to recover the balance.

The court of appeals of West Virginia announced the same rule in 1869 in the case of Bloss v. Plymale, 3 W. Va., in the following language quoted from pages 404, 405:

"In the case of Parker v. Lamon, decided in the reign "of James I., Hobart, 70, it was held that a judgment of

"nol pros. as to one or more joint trespassers before judg-
"ment would discharge the action. But in the next reign
"that case was overruled, and the more rational doctrine
"held that a discontinuance as to one defendant was a
"mere agreement to relinquish the action as to him only,
"and he alone could take advantage of it, plaintiff being
"still at liberty to proceed against other defendants (Wash.
"v. Bishop, 3 Croke, 243). Since then the current of au-
"thority has been uniform on the point (Noke v. Ingham,
"1 Wilson, 90; Dale v. Tyre, 306; 3 Term Rep. 511; Cooper
"v. Tiffin). The cases are collected and approved by Wil-
"liams in his work to Salmon v. Smith, 1 Saunders, 202,
"note 2.

"They fully establish the rule that a nolle prosequi dis-
"missal or discontinuance as to one defendant before
"judgment does not enure to the benefit of the others."
"* * *

"It was early held that the absolute release of one joint
"trespasser discharged all the rest who participated in
"the act, and such is still the rule. But the release plead-
"ed as a discharge for all, that has been given to one only,
"must be a technical release, under seal, expressly stating
"the cause of action to be discharged without condition
"or exception (Frink v. Green, 5 Barb.; De Zlug v. Baily,
9 Wend., 336; Rowl v. Stoddard, 7 Johns. 207).

"So strictly are these technicalities adhered to that
"no release is allowed by implication; it must be the im-
"mediate result of the terms of the instruments, which
"contains the stipulation, hence it is that a covenant not
"to sue one joint debtor or trespasser, though it operates
"between immediate parties, does not extend to the oth-
"ers.

"In the case of Lacy v. Kynaston, 1 Lord Raymond, 689, "reported also in 12 Modern, 548, it was held that a cove- "nant not to sue was personal to the covenantee only, and "could not be set up against the other joint parties. And "though such covenant might operate as a release be- "tween the parties to it to avoid circuity of action, yet it "could extend no further (Farrell v. Forest, 2 Saunders, p. "48, note 1)."

In New Hampshire the rule is announced in the following words:

"Nothing short of payment of the damages by one of "two or more joint trespassers or a release under seal will "operate as a discharge of the other trespasser."

Snow v. Chandler, 10 N. H., 92 (syllabus, decided in 1839). The same in Mass.

Shaw v. Pratt, 39 Mass. (22 Pick.), 307.

Three of the cases above cited have received the sanction of the editors of the American Decisions and American Reports, and are now noted in those reports as precedents worthy of preservation, and to an extent leading.

Ellis v. Esson, is found in 36 Am. Rep., 830.

Snow v. Chandler, in 34 Am. Dec., 140.

Bloss v. Plymade, in 100 Am. Dec., 752.

In Alabama, the rule is announced in the following language in

Smith v. Gayle, 58 Alabama, 607:

"If the purpose is to release a part only of a demand "and not the whole, or one only of several jointly liable, "it is released only pro tanto. No other or greater effect "can be given it than the parties intended. A release to "one of several joint contractors, though the creditor "should retain the right to proceed against the others, "would release them, to the extent that they could de- "mand contribution from the associate who is released. "It would have no other operation. The release of Har- "per, and the acceptance from him of three thousand dol- "lars, on account of the use and occupation of the prem- "ises during the period she was deprived of the possession "by the trespass complained of, satisfies the plaintiff's "right of recovery, in this action, to that extent only. A "satisfaction to that extent, it is apparent the parties "contemplated, and so it must operate, or the plaintiff "would obtain a double satisfaction. If any larger oper- "aation was given it, the intention of the parties would "be defeated. Harper stipulated for his own release, not "for the release of the defendants to this suit. It was "partial, not entire, satisfaction he proposed to make, and "the plaintiff agreed to accept. The present defendants "are benefited, not wronged. Contribution from Harper "they could not have compelled, and their liability is les- "sened by the payment he has made and the plaintiff "has accepted. If the release had been intended "to cover the entire cause of action embraced in the com- "plaint, if it had been intended to accept the sum paid, "in full satisfaction, such would be its operation, and all "who participated in the trespass would be discharged. "But it was partial compensation, for the loss of the use "and occupation and the discharge of Harper only that

"was intended, and beyond that it is not available to the "present defendants (Snow v. Chandler, 10 N. H., 62; "Chamberlain v. Murphy, 41 Vt., 110)."

In the case last cited there is a reference to a statute which requires that all instruments, whether sealed or unsealed, must have effect according to the intention of parties to the same. Virtually the same provision is found in our Code abolishing the distinction between sealed and unsealed instruments.

Section 1629, C. C.

Tracey v. Alvord (supra).

S. P. Co, v. Von Schmidt (supra.)

There are other statutes, in California, notably sections 1427, 1428, 1708, 1714 and 1543 of the Civil Code, which have a bearing upon this case. They appear absolutely to abolish the distinction between rights of action resulting from tort and those arising from contract.

Section 1428, C. C., reads, "An obligation arises either from:

"1st—Contract of the parties; or

"2d.—Operation of law."

Sections 1708 and 1714, C. C., expressly include, within the definition of obligations imposed by law, those arising from negligence in particular. The old rule distinguishing torts as a special class of obligations is abolished, and all those upon whom obligations are imposed are debtors within the meaning of the Code.

"Section 1543. A release of one of two or more joint "debtors does not extinguish the obligations of any of "the others, unless they are mere guarantors, nor does it "affect their right to contribution from him."

This alone would seem to be conclusive that Thomas was not released.

But waiving that, the general doctrine is, by all careful writers and courts, recognized to be that a release in whatever form must be given affect according to the intent of the parties.

That a release of one defendant by dismissal and receipt of money, on account of the claim sued upon, is a release pro tanto only against the other defendants; that where there are joint tort feasors the satisfaction of the claim as against one must amount to a payment of the full amount of the claim (that is to an accord and satisfaction) to operate as a release of the others. This is so even in the case of personal torts, and must be so where the damages resulting from the wrong are capable of exact estimate, be the suit in tort or contract.

In addition to the cases cited above the following authorities sustain this doctrine.

West Chic. etc. Co. v. Piper, 165 Ill. 325 (citing Chicago v. Babcock).
Taylor W. Co. v. Dillard, 29 S. W. Rep. 662.
Mer. N. Bank v. McAnnulty, 31 S. W. 1091. Tex.
City of Valparaiso v. Moffit, 12 Ind. App. 250.
Mathews v. Chicopee, 3 Robt. (N. Y.), 713.

Woods v. Pangburn, 75 N. Y. 495.

Arnett v. U. P. R. R., 2 Mo. App. Reporter 971. (vide.)

San Antonio v. Mackay, 3 S. W. 760 (Tex. C. A.)

Couch v. Mills, 21 Wend. 424.

Solly v. Forbes, 2 Brod. & Bing. 38.

Ford v. Beech, 11 Q. B. 852.

Bank of Catskill v. Messenger, 9 Cow. 37.

Line v. Nelson, 38 N. J. L. 358.

Fitzgerald v. Smith, 1 Ind. 310.

Lumley v. Wabash R. R. (C. C. A.) 76 F. 66.

Lovejoy v. Murray, 3 Wall. (70 U. S.) 1 and 17.

Dawson v. Schloss, 93 Cal. 194-199.

Jaggard on Torts, 117.

Cooley on Torts, 2d ed., 139, note 1.

Am. and Eng. Ency., Vol. 20, Title Release, p. 766.

Irvine v. Milbank, 56 N. Y. 635 (s. c. 15 Alb. Pr. N. S. 358.) (Ct. of Appeals per Folger, J.) (Superior Ct. 14 Abb. Pr. N. S. 408; s. c 4 J & S. 264.)

We quote from a well known text book the following:

"A part payment on a claim for damages by one co-"trespasser enures to the benefit of all, and being less "than the damages, if not understood to be in full satis-"faction, releases the other joint trespasser only pro "tanto."

"The parol release of one joint tort feasor is not the dis-"charge of the others, unless the debt be fully satisfied. "If in such case the apparent intention is not to release

"or discharge the debt, but to release only the one from "liability, the courts usually hold the agreement to be a "covenant, not to sue that one and permit the plaintiff to "proceed against the others."

20 Am. and Eng. Ency., 766.

The California Cases Uphold Our Position,

In the case of Urton v. Price, cited by the State Supreme Court, the jury found a special verdict, and among other facts found were these, in the language of the verdict:

"The plaintiff received satisfaction for the injury al- "leged in the complaint from the defendant Mechanics' "Institute. . . . . The plaintiff received damages in the "sum of $500."

On such a findng it is hard to see how the case could have been decided in any other way. But in the case at bar, there is no such finding nor any evidence that would warrant any such finding.

In the case of Tompkins v. Clay Street Railroad, the trial court refused to instruct the jury

"That if plaintiff had received compensation from one defendant, their verdict must be for the defendant."

The only note of criticism possible in comment on that case is, that the word "compensation" is confused with the word "satisfaction." For if one is the equivalent of the other (and the words appear to be so used), then it was error to refuse such instruction, and the case was prop

erly decided. But such a case is readily distinguishable from the plaintiff's case, wherein he sues for certain well ascertained, clearcut pecuniary losses. Not one loan, but several. Not occurring at one particular time, but running through a long course of many months, and being connected with each other in no way except by the fact that the defendants in their official positions failing to exercise proper supervision were culpable and negligent in not preventing such loans. This is the only link by which these different, several, separate, and distinct so-called torts are united in this action.

And all that Thompson and Wilson undertook to do was to make good a part of these losses, to pay some two or three of these items of the account.

For such wrong as was suffered by the plaintiff in error in whatever form or forum the remedy is enforced, the result being a judgment for a sum certain and interest, and the only bar to the right of action where there are joint tort feasors or joint debtors arising from a satisfaction of the cause of action, such satisfaction to release all parties must be a full and not a partial satisfaction.

In this connection we would refer to the case of Dawson v. Schloss, 93 Cal. 194, 199, where a judgment against two defendants was reversed as to one, and upon a retrial a less judgment given against the party who had appealed, the other judgment remaining untouched and unsatisfied. In the opinion the cases of Urton v. Price and Thompkins v. Clay Street Railroad are distinguished, and the reason of the rule given, the statement being made

that the vital point is the satisfaction without which there can be no release of a joint wrongdoer.

In Nichols v. Dunphy, 58 Cal. 605 (as in Dawson v. Schloss) a judgment was reversed as to one joint tort feasor and affirmed as to another and on retrial a second judgment in the same action recovered against the party who had appealed.

This was going a step further than the rule adopted in the common law courts. See Sedgwick on Damages, vol. 3, p. 1286, from which we quote:

"In many cases of joint trespass and several damages "given, the plaintiff is permitted to enter one joint judg- "ment against all, assuming the largest sum assessed "against any one is the damages against all de meliori- "bus damnis. So where a joint tort has been committed "and the referee found that the plaintiff had been dam- "aged by one of the defendants to the amount of $600, and "by the other to the amount of $150, it was held by the "Superior Court of New York that the judgment was "rightly entered against both in the larger amount, or "the error may be cured by entering a nolle pros. against "all but one and taking judgment against him only."

The practice adopted here was similar to this. This practice follows our statute, section 578, 579, C. C. P., and is sanctioned by the Supreme Court of the United States in Lovejoy v. Murray, supra.

The opinion written by Hon. Justice Henshaw in the case at bar cites Merritt v. Campbell, 47 Cal. 542, to the

effect that the dismissal here entered amounted to a retraxit, and argues from that that it was a release and a discharge of all three defendants.

There are several answers to this:

First.—That was a case where a single defendant pleaded a dismissal in bar. The differences between a retraxit and a nolle pros. which control this case (as a case at law) were absolutely immaterial there. The case is not authority therefore on the points cited.

Second.—The dismissal given in this cause was not the sace as that in case cited. The concurring opinion of Justice Crockett on rehearing, in that very case makes the distinction between dismissals under the statute (581, C. C. P.), and one made, as in that case, upon the oral agreement of the parties in open court.

Third.—The correctness of that ruling has been doubted as recently as case of Pierce v. Hilton, 102 Cal. 276, 277, and in Landregan v. Peppin, 94 Cal. 465-470, where the Court say they are not disposed to extend the doctrine of that case.

Fourth.—All that Merritt v. Campbell decides (if it has not been overruled) is that "such judgment (as was there "rendered), if properly pleaded, will consctitute a defense "to another claim (or suit), afterwards brought upon the "same cause of action." (Landregan v. Peppin, supra, p. 470).

This is not saying that such judgment is a release, and very far from the doctrine that such dismissal and judgment amounts to a satisfaction.

The word "retraxit" is used in the opinion in that case, but no such meaning was there attached to it as the Court in this cause give it. (See 104 Cal. 669.)

Fifth.—Except as affecting the question whether or not the dismissal is a bar to another action, the case of Merritt v. Campbell and the definitions and doctrines of retraxit and nol pros are unimportant.

Sixth.—The dismissal and judgment are a release only by operation of the doctrine of res judicata. See cases cited supra, and

Wohlford v. Compton, 79 Va. 338; 21 Am. & Eng. Ency. Law, 297-299.

Beecher's Case, 8 Coke Rep. 58.

Stoutenborough v. Board of Edu., 104 Cal. 664.

Van Vleet's Former Adjudication, Vol. 1, p. 173 ff, secs. 50, 51, 581, 582, C. C. P.

Halleck v. Loft, 19 Colo. 74.

Seventh.—The judgment in Merritt v. Campbell was expressly held to be no release, nor akin to a release or a satisfaction, but to be a judgment on the merits in favor of defendants, and the decision is based on the statutes of the state. See opinion rendered on rehearing, from which we quote:

"Sec. 149, Practice Act, provides that in every case other than "those mentioned in the last section, the judgment shall be ren- "dered on the merits."

"This judgment, therefore, was not rendered in accordance "with any of the provisions of section 148, but upon the oral "agreement of the parties in open court, and with a stipulation 'that the defendant would pay certain costs, must be deemed "to be a judgment against plaintiff on the merits, rendered by "consent of parties."

Merritt v. Campbell, 47 Cal. 543-548.

A judgment on the merits under the Code in favor of one defendant would not affect the others, there being no satisfaction of the claim.

The vital question in all cases must be, where there is a consideration for the dismissal or judgment in favor of defendants, Was there a satisfaction of the claims? (Jaggard, sec. cited.)

Without that a judgment on the merits against the plaintiff in suit against one is not a bar as against another defendant in the same or in separate suits.

The satisfaction is the essential thing.

Here the trial court finds there was none, that the payment was made and received as a partial payment merely on account of the total claim in suit.

The opinion in the case at bar would make a dismissal operate as a satisfaction whether so intended or not. This was the error into which the court fell.

From an opinion by Judge Story (Minor v. Mechanics' Bank, 1 Peters, 44)we quote the following (p. 74):

"The nature and effect of a nolle prosequi was not well "defined or understood in early times; and the older au- "thorities involve contradictory conclusions. In some "cases it was considered in the nature of a retraxit, ope- "rating as a full release and discharge of the action, and "of course as a bar to to any further suit. In other cases "it was held not to amount to a retraxit, but simply to an "agreement not to proceed further in that suit, as to that "particular person or cause of action to which it was ap- "plied. And this latter doctrine has been constantly ad- "hered to in modern times and constitutes the received "law."

"In cases of tort against several defendants, though "they all join in the same plea, and are found jointly "guilty, yet the plaintiff may, after verdict, enter a nolle "prosequi as to some of them and take judgment against "the rest."

"The authorities, and particularly the American, pro- "ceed upon the ground that the question is matter of "practice, to be decided upon considerations of policy and "convenience, rather than matter of absolute principle; "and that therefore this Court is left at full liberty to en- "tertain such a decision as its own notions of general con- "venience, and legal analogies would lead it to adopt. "We are of opinion that where defendants sever in their "pleadings, a nolle prosequi ought to be allowed. It is a "practice which violates no rules of pleading, and will "generally subserve the public convenience. In the ad-

"ministration of justice, matter of form, not absolutely "subjected to authority, may well yield to the substantial "purposes of justice."

In an action against several, a dismissal may be entered against one and the action proceed against the others:

United States v. Leffler, 11 Pet. 86.
Griffin v. Reynolds, 17 How. 612.
Barry v. Foyles, 1 Pet. 311.
Minor v. Mec. Bank.

In case of suits for damages for torts, nothing short of recovery of a judgment against one for the injury *and a satisfaction* of that judgment will bar an action against the others:

Sessions v. Johnson, 95 U. S. 349.
Birdsell v. Shaloil, 115 U. S. 489.
Lovejoy v. Murray.
(See also Planters v. Union Bank, 16 Wall. 497.)

THE DECISIONS OF THIS COURT ARE TO THE SAME EFFECT. THE RULE IS ONE OF GENERAL LAW.

We quote first from pages 10 and 11 of 70 U. S.. (Case of Lovejoy v. Murray.)

"Two propositions seem to be conceded by all the au- "thorities which bear with more or less force on the main "question, and which may as well be said here: That all "persons engaged in committing the same trespass are "joint and several trespassers, but not joint trespassers

"exclusively, and like persons liable on a joint and several "contract, may be all sued in one action; or one may be "sued alone and cannot plead the non-joinder of "the others in abatement, and so far as the doctrine of "several ability carried, that the defendants, where more "than one was sued in the same action, may enter separ- "ate pleas, and the jury may find several verdicts, and on "several verdicts of guilty may assess different sums as "damages."

Recent decisions of many courts affirm the rule.

A very recent authority is Taylor v. Dillard, in the Court of Civil Appeals of Texas, reported in 29 S. W., 662 and 9 Tex. C. A. 669. We quote from the syllabus.

"Where one sues joint tort feasors jointly he may, after "introducing his testimony, waive his right to recover "against one of defendants.

"Action by Henry Dillard against the city of Taylor to "recover for personal injuries. A cross action was insti- "tuted by defendant against Taylor Water Company. "From a judgment for plaintiff against defendant water "company but in favor of defendant city, the water com- "pany appeals. Affirmed."

The court there say with reference to this point:

"There is no merit in the contention that, because the "court found that the city of Taylor and the water com- "pany were jointly liable, a separate judgment could not "be rendered against the latter. It is not necessary to "cite authorities in support of the proposition that joint "tort feasors may be sued separately or jointly, at the

"pleasure of the injured party. The plaintiff in open "court, after introducing his testimony, waived his right "to recover against the city of Taylor, and, therefore, not- "withstanding the court's finding that the facts showed "it to be liable, the court correctly rendered judgment in "favor of the city of Taylor."

The first case we have cited on this head (Chicago v. Babcock) has been lately approved by the highest court in Illinois (West Chicago, etc. Co. v. Piper), where the doctrine is clearly stated that a dismissal of a pending suit against one defendant for a consideration is not a release nor equivalent to a release of the other (165 Ill. 325).

We have suggested a distinction between causes where damages are divisible or severable, or capable of exact proof so that a partial satisfaction is possible, where a mere receipt of money amounts to simply a payment on account, and those where the amount must rest in the sound discretion of the jury. Here they are capable of exact proof. It is a mere matter of accounting, and of the various items in that account the record is silent. The payment made by Wilson and Thompson undoubtedly paid some of these and left the balance of the items unpaid. This distinction is made in the cases, and is based on sound reason.

Ellis v. Esson, 36 Am. Rep. 830.

Lumley v. Wabash R. R. (C. C. A.), 76 F. R. 66 (and cases cited).

We submit that if plaintiff had the power to satisfy the claim of the corporation, he did not do so; he did not release or exonerate defendant in error by the dismissals in the record, he merely consented to the payment by two defendants of part of the whole claim or cause of action asserted. There was no satisfaction. There was no release.

SIXTH POINT.

Plaintiff, a stockholder merely, had no power to release or satisfy the claim of the corporation.

POWER OF PLAINTIFF TO GIVE A RELEASE.

He sued in a representative capacity, and as plaintiff had no power to accept in satisfaction anything less than the full amount of the judgment which the Court awarded. The doctrine is elementary and is laid down in Daniel's Chancery Practice, Val. 1, 244-794 and 795, that

"After decree (or decretal order) the defendant cannot "by his conduct deprive other persons of the same class "of the benefit of the decree if they think fit to prosecute ".t." Citing a number of cases.

"After a decree has been made of such a kind that other persons, besides the parties on the record, are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill. Thus, where a plaintiff sues

on behalf of himself and all other persons of the same class; although he acts upon his mere motion, and retains the absolute dominion of the suit until the decree, he cannot by his conduct deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it. 'The reason of the distinction is, that, before decree, no other person of the class is bound to rely upon the diligence of him who first instituted his suit, but may file a bill of his own; and that, after a decree, no second suit is permitted' " (1 Daniel, 794-5).

By decree as used in this extract is meant the announcement of a decree or decretal order (ib. 793-4). After that no dismissal will be allowed as of course, all parties being interested in the matter after that time.

In the case at bar, such order had been made, and decree announced. From that time forth, therefore, the plaintiff's absolute control of the suit ceased. He could not dismiss without consent of parties and order of the Court, nor could he satisfy the judgment obtained without receiving the full amount.

The judgment obtained and entered was in favor of and for the benefit of the California National Bank, of San Francisco. No portion of it went to plaintiff nor inured to his benefit, except indirectly and through the medium of the corporation whose rights he sought to enforce.

The suit is for the benefit of the corporation and decree in but one such suit is permitted.

Beach Mod. Eq. Pr. 66.
1 Dan. Ch. Pr. 191-794, n. 3.
Thompson on Corporations, 4566-4605.
Morawetz on Corporations, sec. 256.

Plaintiff is not even entitled to the custody of that fund paid into court, or any portion of it, without consent of the corporation, or the stockholders interested. The corporation, unless some equitable reason prevents, can go in and collect what his labors, money and perseverance have recovered for it, subject only to his right to such reasonable and proper allowances for his fees, costs and expenses, including counsel fees, as the Court by law may see fit to make, and to the right of the Court to distribute the fund directly among the stockholders if necessary to do complete justice.

Wickersham v. Crittenden, 93 Cal. 17.
Fox v. Hale & Norcross, 108 Cal. 475.
Chetwood v. Bank, Stateler appellant, 113 Cal. 649.

In the case last cited the Court ordered this very fund of $27,500 turned over to Mr. Stateler, representing the corporation under appointment by the Controller, after making allowance to Chetwood for his costs. If Chetwood is not entitled to receive the money, even temporarily, it is difficult to see how he can be held to have satisfied the judgment, even if fully paid, and certainly he could not accept part payment as full satisfaction.

The case is not distinguishable from the case of co-plaintiffs, and it has been distinctly held that one of two

co-plaintiffs cannot satisfy a judgment except upon receipt of the whole amount recovered.

Haggin v. Clark, 61 Cal. 1.

It is analogous to the case of satisfacton by an attorney-at-law, which of course can be entered only on receipt of the full amount.

Section 283, C. C. P. Cal., Sub. 2, and note to Deering's edn.

Weeks on Attorneys, page 218.

Freeman on Judgments, 463.

At common law the rule with reference to release by nominal parties was that the Court would interfere to prevent defendants pleading a release, if it be shown that the release was executed by persons who were suing as mere trustees, having no real interest in the subject matter.

A judgment of dismissal by a nominal plaintiff pleaded in a replication to a plea of retraxit, held the replication was good, as the facts show that such dismissal could not amount to a retraxit.

Rawstorne v. Gandell, 15 M. & W. 307.

Welch v. Mandeville, 1 Wheat. 233.

7 Robinson C. P. 525-904.

The courts of common law exercised a sort of equitable power in their treatment of releases and dismissals by nominal parties. But by the decision n the case at bar

the courts under the Codes have less power than the courts of common law to prevent frauds or a plain violation of the intent of the parties.

Here the plaintiff is held to have possessed a power he never thought of exercising; to have effected a settlement and release that no one contemplated or intended, to have possessed, and unwittingly wielded the powers belonging to the whole Board of Directors. Yet he is but a mere stockholder, with no delegated powers whatever. He could not satisfy the claim any more than he could have sold and assigned it.

It is not the ordinary case of one suing for many.

The order of the Court gave the corporation as well as the other stockholders rights that Mr. Chetwood could not, if he had wished, have forfeited.

The trial court having considered that the losses of the bank caused by defendant in error amounted to $166,000, no one without consent or authority from the bank could release that claim. Without special authority even the bank's officers could not compromise it.

Indeed if the Court's order for judgment was, as the appellate court assume, equal to a judgment, a release by the bank of one or all on part payment of the amount due would have been without consideration and void at common law.

Fitzgerald v. Smith, 1 Ind. 310.

And after this order the cause of action was no longer plaintiff's. He could not release, retract or renounce it, nor satisfy it himself, not even on payment to him of the whole amount.

Had the trial court, on the finding of facts in the record, drawn the conclusions deduced by the appellate court, and entered judgment accordingly exonerating Thomas, we submit such judgment would have been not simply erroneous, but void for want of power in the Court to enter it. It certainly was error in the appellate court to order such judgment not pursuant to but in violation of the stipulation of parties.

It is to be noted that the Court does not, in its opinion, distinguish between the claim of plaintiff and that of the bank. The recital is that the plaintiff has released his claim. But the judgment is that a recovery in favor of the corporation be vacated and the defendant in error wholly exonerated and discharged from any claims of the corporation.

The tort there held to be satisfied is the loss suffered by the bank.

The judgment does not go on the theory that the plaintiff has been paid for his individual losses, but because the whole damage suffered by the bank has been the subject of an accord and satisfaction, and a release a retraxit as it is termed.

This is the vital point in the case.

It is this, that by denying the rights claimed under the

statute gives this court jurisdiction. It is this error in treating the suit as at law, the claim one for a tort, the dismissal as a satisfaction of the bank's claim, that gives the bank the right to sue out this writ of error.

The plaintiff might release his own claims. He did not undertake or attempt to do even this. The Court in holding that he had renounced and retracted, satisfied and released the claims of the corporation—or of the other shareholders—certainly erred.

This is the effect of the decision and for this it should be reversed and the judgment of the trial court left as it was entered.

Recapitulation.

We submit the following as some of the conclusions warranted by the law and the facts of this cause:

1.

That a legal right ("a capacity residing in the plaintiff in error of controlling the acts of the defendant in error") claimed under a statute of the United States, has herein been denied by the final judgment of the Supreme Court of California, giving this Court jurisdiction.

2.

That on any theory of the case, the State Supreme Court erred in deciding that the defendant in error was

released by the acts of plaintiff or by the proceedings in the trial Court. Such ruling not only does violence to the plain intent of all parties, it ignores the statutes of the State. It is contrary to all precedents. It violates fundamental rules of common law as well as of equity.

There was no release in the case. For whatever amount the defendant in error was responsible under the law and the facts at the beginning of the trial, judgment should have been given allowing credit for anything paid thereon

3.

On the general right to a judgment against defendant in error on the facts there can be no dispute. His liability is practically admitted. He made no answer, set up no defense. The defense of Thompson and Wilson is that he is mainly responsible. This the Court found to be the truth. The suit is a proceeding in equity and the decree of the trial Court should stand.

4.

The case being one of equitable cognizance, the conclusion and decree of the trial Court was wholly right on the pleadings and findings. It was error for the appellate court to disturb that decree; and the order of this Court should reverse the judgment of the Supreme Court of California, and reinstate and declare valid the judg-

statute gives this court jurisdiction. It is this error in treating the suit as at law, the claim one for a tort, the dismissal as a satisfaction of the bank's claim, that gives the bank the right to sue out this writ of error.

The plaintiff might release his own claims. He did not undertake or attempt to do even this. The Court in holding that he had renounced and retracted, satisfied and released the claims of the corporation—or of the other shareholders—certainly erred.

This is the effect of the decision and for this it should be reversed and the judgment of the trial court left as it was entered.

Recapitulation.

We submit the following as some of the conclusions warranted by the law and the facts of this cause:

1.

That a legal right ("a capacity residing in the plaintiff in error of controlling the acts of the defendant in error") claimed under a statute of the United States, has herein been denied by the final judgment of the Supreme Court of California, giving this Court jurisdiction.

2.

That on any theory of the case, the State Supreme Court erred in deciding that the defendant in error was

released by the acts of plaintiff or by the proceedings in the trial Court. Such ruling not only does violence to the plain intent of all parties, it ignores the statutes of the State. It is contrary to all precedents. It violates fundamental rules of common law as well as of equity.

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The case being one of equitable cognizance, the conclusion and decree of the trial Court was wholly right on the pleadings and findings. It was error for the appellate court to disturb that decree; and the order of this Court should reverse the judgment of the Supreme Court of California, and reinstate and declare valid the judg-

ment of the Superior Court of the City and County of San Francisco, wherein the cause was tried.

Respectfully submitted.

San Francisco, December 27, 1897.

E. G. KNAPP,
Counsel for Plaintiffs in Error.

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